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Commonwealth Ombudsman

Work Practices Manual for complaint management

(Updated) January 2019

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Chapter 1—Role and responsibilities

1.1 Role

The Commonwealth Ombudsman is also the ACT, Defence Force, Immigration, Law Enforcement, Overseas Students, Postal Industry and Taxation Ombudsman. The other States and the Northern Territory each have their own Ombudsman.

Any decisions made to investigate or make recommendations or suggestions in relation to ACT complaints are consistent with the *Human Rights Act 2004* (ACT).

What we do

We:

- provide advice, information, assistance and referrals as required
- investigate complaints about Australian Government agencies where appropriate
- resolve approaches in an impartial and effective way and seek appropriate remedies
- foster good complaint handling in Australian Government agencies
- highlight problems in public administration through approach handling, own motion investigations and reporting
- contribute to public discussion on administrative law and public administration
- focus attention on the adverse impact that government administration can have on individuals
- promote open government
- collaborate with Ombudsman offices in the Asia-Pacific region through joint regional activities
- inspect the accuracy and comprehensiveness of law enforcement records, including telephone interceptions and controlled operations
- assess the appropriateness of immigration detention arrangements
- foster good public administration.

An approach is a contact with the office about a new matter regarding one of our core business functions.

We receive and consider approaches from members of the public, including complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government department or agency.

A complaint can be defined as an expression of dissatisfaction or a grievance with an organisation's policies, procedures, charges, employees, agents, quality of service or product sold or provided.

We do not investigate all complaints. Often, we refer people back to the agency complained of in the first instance, or to a more appropriate review path.

Our Corporate Plan and Service Charter detail our role and explain the service people can expect from our office.

Background

An ombudsman is an official, usually (but not always) appointed by the government or parliament, who is charged with representing the interests of the public by investigating and addressing complaints reported by individual citizens. The modern meaning arose from its use in Sweden with the Parliamentary Ombudsman instituted in 1809 to safeguard the rights of citizens by establishing a supervisory agency independent of the executive branch. The word ombudsman is not gender specific. Its specific meaning has since been adopted into English as well as other languages, and ombudsmen have been instituted by many other governments and organisations. The origin of the word is found in Old Norse and the word *umbudsman*, meaning representative. The first preserved use in Swedish is from 1552. It is also used in the other Scandinavian languages such as the Icelandic *umboðsmaður*, the Norwegian *ombudsman* and the Danish *ombudsmand*.

New Zealand became the first English-speaking country to appoint an ombudsman in 1962. The office of the United Kingdom Ombudsman was established in 1967.

The first ombudsman in Australia was appointed in Western Australia in 1971 followed by appointments in the other states and the Northern Territory in the ensuing years.

Legislation to establish an office of Commonwealth Ombudsman was enabled in 1976, and the first Commonwealth Ombudsman, Professor Jack Richardson, was appointed in March 1977. The Office of the Commonwealth Ombudsman commenced operation on 1 July 1977. The Commonwealth Ombudsman is also the ACT Ombudsman until such time that the ACT Government appoints an ombudsman under ACT legislation.

The concept of the ombudsman as an independent person who can investigate and resolve disputes between citizens and government has spread to over 120 countries and is seen to be an essential accountability mechanism in democratic societies.

History of this office

The office of the Commonwealth Ombudsman is an important part of the Australian Government's administrative review system, and was created by the *Ombudsman Act 1976*.

Australian administrative law in the 1960s and 1970s

During the 1960s and 1970s, the administrative processes of government were increasingly impacting on Australians, but there was no coordinated approach to administrative law reform that could address the problems created by the heightened complexity of government administration.

Ordinary Australians had no straightforward, affordable means to test administrative actions or decisions. Access to redress via the courts through a judicial review process was impeded by rigidity and the inherent danger that justice could be denied by a technicality.

Australia began seriously to consider the benefits of the Ombudsman model following the passage of the Parliamentary Commissioner (Ombudsman) Act through the New Zealand Parliament in 1962.

Three years later, Mr Justice Else-Mitchell, then a member of the Supreme Court of New South Wales, catalysed a broader movement for administrative law reform when he delivered a paper titled 'The Place of the Administrative Tribunal in 1965' at the Third Commonwealth and Empire Law Conference in Sydney.

The Kerr Committee

On 29 October 1968 the Government established the Commonwealth Administrative Review Committee, known as 'the Kerr Committee' after its Chairman Sir John Kerr, then a member of the Commonwealth Industrial Court.

On 14 October 1971 the Kerr Committee presented a report recommending the establishment of:

- a general counsel for grievances (an Ombudsman)
- an administrative review council
- an administrative review tribunal
- a codified judicial review system before a specialist court
- an administrative procedure statute.

The Kerr Committee saw the Ombudsman as a 'general counsel for grievances' set in the area of administrative review, rather than in a parliamentary executive situation.

The Kerr Committee suggested that the general counsel for grievances should be associated with a general appeal tribunal and other review institutions.

The Bland and Ellicott Committees

Following the release of the Kerr Committee's report, the Government appointed two committees to further examine administrative law reform in Australia, known as the Bland and Ellicott Committees.

On 19 January 1973 the Bland Committee made an interim report proposing the establishment of an Ombudsman's office.

The Ellicott Committee's report of 29 May 1973 recommended that the Government should adopt the Kerr Committee's judicial review proposals, including that the Government should appoint a general counsel for grievances or an ombudsman.

In effect, the Kerr, Bland and Ellicott Committees recognised that the existing avenues of redress for people having problems with administrative actions and decisions were complex, expensive and difficult to access for many Australians.

During his delivery of the second reading speech on the Ombudsman Bill to the House of Representatives in June 1976, Mr Ellicott said that the most important element of the new legislation was that it would provide the citizen with a legitimate complaint about official action with access to an impartial investigator to inquire into the matter.

'The strength of the ombudsman's work lies in the independence and impartiality of his investigation', Mr Ellicott said.

The Commonwealth Parliament passed three major pieces of legislation as the result of the reports by the Kerr, Bland and Ellicott Committees.

These Acts recognise four bodies as elements in a comprehensive structure:

- the office of Ombudsman established by the *Ombudsman Act 1976*
- a general administrative appeal tribunal – the Administrative Appeals Tribunal (AAT) established by the *Administrative Appeals Tribunal Act 1975*

- a new system of judicial review, introduced by the *Administrative Decisions (Judicial Review) Act 1977*
- a body to monitor and review the new structure – the Administrative Review Council established by the Administrative Appeals Tribunal Act.

An Australian Ombudsman

Before he became Prime Minister in 1972, the Hon. Gough Whitlam MP foreshadowed the appointment of an Ombudsman as a 'guardian of the people'.

The Ombudsman would investigate complaints from members of the public about unjust treatment by government departments and authorities and would report directly to Parliament.

The Whitlam Government introduced the Ombudsman Bill into Commonwealth Parliament in 1975, but it lapsed with the double dissolution of both houses in November 1975.

The Government headed by Prime Minister Malcolm Fraser reintroduced the Ombudsman Bill in June 1976, and in March 1977 the Prime Minister announced the appointment of Professor Jack Richardson as Commonwealth Ombudsman for a seven-year term.

When announcing the appointment of the Ombudsman in the House of Representatives, Prime Minister Fraser said: 'The establishment of the office is directed towards ensuring the departments and authorities are responsible, adaptive, and sensitive to the needs of citizens'.

Since its establishment, the office has received hundreds of thousands of complaints and made many reports and recommendations to improve public administration. Many complaints have been resolved informally without the need for the Ombudsman to make formal recommendations for remedial action.

More information about each of the people who have held the office of Ombudsman is held on our external website.

1.2 Professional complaint-handling systems

Based on the requirements of AS ISO 10002-2006, the Australian Standard for Complaint Handling, the key aspects of effective complaint handling are:

- that complainants' concerns are taken seriously, treated courteously, and acted on appropriately
- good communication
- effective problem solving
- consistency of outcomes
- making any necessary changes to office procedures, policies and practices that could help to avoid similar problems in the future.

These standards apply to our own approach-handling process and are also expressed through our service standards and values.

1.3 Values

We should always bear in mind the following principles when handling complaints, dealing with the public and agencies, and exercising our powers as delegates.

We strive to maintain the highest standards of professionalism in our work. We routinely criticise other agencies when our investigations identify administrative shortcomings. We also recommend ways they can rectify problems by introducing better and fairer procedures. This leaves us open to criticism regarding our own practices. We should ensure we are as rigorous in our own work practices as we expect other agencies to be.

Our values are adapted from the essential elements required for an effective complaints handling process, as outlined in our strategic framework (see Our purpose, the APS Values and Code of Conduct and Australian Standard ISO 10002-2006. In particular we are committed to:

- integrity
- impartiality and independence
- professionalism
- fairness, courtesy and respect
- efficiency
- confidentiality
- accessibility to all sections of the community
- openness and accountability for our actions and decisions.

Consultation

The office encourages constructive teamwork. You are not expected to work in isolation. You should discuss your investigations with fellow team members, managers and agency specialists. When making decisions, consider relevant administrative policies, seek and consider comments from others and, if uncertain, refer matters to more senior decision-makers. In particular, you should consult with your manager about matters which:

- have the potential to be contentious with agencies
- involve criticism of an agency or its actions
- may attract media interest
- are the subject of representations from a Member of Parliament.

1.4 Service standards

Our service standards include average processing time guidelines (formerly timeliness standards) for various types of contacts with agencies and complainants when handling approaches. They set the desired standards for service expected to apply to normal cases. Genuinely urgent matters will require higher priority.

Investigation Officers (IOs) should be aware of the different service standards and average processing times within the office and their purpose:

- Any publicly stated service standards that might be outlined on our web site and Service charter serve the purpose of expectation management.
- The internal average processing times (see below) expressed in the Work Practices Manual (WPM) serve a different purpose, to indicate to staff the duration of investigations at different levels of complexity, in typical or optimal circumstances. The internal average processing times are also used as a foundation for performance reporting of individuals, teams, and the organisation as a whole, particularly to indicate changes in performance over time.
- Our internal communications standards, (see next page), provide best-practice guidelines for the conduct of an investigation.

- The *Resolve* category and action due dates, based on the internal average processing times, assist IOs to prioritise their work and help managers to manage workloads within teams.
- The 'natural justice response times' contained in the WPM are intended to allow agencies and complainants a reasonable time to exercise their right to comment on a decision by the office.

If there is a problem in achieving an average processing time (for example, where you cannot contact a complainant or where there is an unavoidable delay at an agency), you should make a record in *Resolve*. If an agency has not given a response within the agreed timeframe you should also raise the issue with your manager to determine whether the approach should be escalated.

Internal average processing times

Quick Checklist: Finalising approaches

Approach Category	To be finalised within
Category 1	3 working days*
Category 2	2 weeks
Category 3	3 months
Category 4	6 months
Category 5	12 months
Review request	60 calendar days

*Timeframe reflects the IOs working days (which may be part-time in which case the complainant should be informed) and is full business days from date of receipt. However, this timeline standard might not be achievable in relation to complaints received during immigration detention facility visits or during outreach to remote indigenous communities.

Internal communications standards

Quick checklist: Timeliness of communications

Communication	Action	Timeline
Phone message	Call back	Within 2 working days. See: 'Call back' attempts.
Communication with complainant	Letter or phone call indicating IO and, to the extent possible, when next communication can be expected For reviews, identify reviewer if a decision is made to conduct a review. Give complainant a likely timeframe for investigation and reporting back.	Within 10 working days of receipt by the office.
Commence investigation	Initial approach to agency	Category 3 and Category 4: within 3 weeks of receipt

Progress report to complainant	Category 3 and Category 4 approaches	Regular communication with the complainant, as needed, or at least every 6 weeks, or within 2 weeks of substantive response from either the complainant or the agency.
Wait for complainant response to decision not to investigate further		28 days maximum, unless communication is by email then 14 days is appropriate**

**A shorter period (eg.14 days) may be appropriate where advice of a decision is sent by email. Overseas Student Ombudsman complainants are routinely given 14 days to respond.

1.5 Jurisdiction

The Ombudsman's jurisdiction is established by examining three issues:

- which agency took the action/made the decision?
- who took the action/made the decision?
- what type of action/decision is the complaint about?

The Ombudsman's authority to investigate certain actions is provided in the *Ombudsman Act 1976* (the Ombudsman Act). Our jurisdiction covers administrative actions of Australian Government departments and agencies, the actions of Australia Post and registered private postal operators and the actions of registered private education providers.

In addition, the *Migration and Ombudsman Legislation Amendment Act* 2005 extended the jurisdiction of the office to include Australian Government services provided to the public by non-government bodies ('Commonwealth service providers').

The Ombudsman Act also creates the Defence Force, Immigration, Law Enforcement, Overseas Students, Postal Industry and the Private Health Insurance jurisdictions. As a result, the Commonwealth Ombudsman is also designated the Defence Force Ombudsman, the Immigration Ombudsman, the Law Enforcement Ombudsman, the Overseas Students Ombudsman, Postal Industry Ombudsman and the Private Health Insurance Ombudsman.

Several other Acts also authorise the Ombudsman to investigate complaints:

- *Ombudsman Act 1989 (ACT)* (largely reproduces the Commonwealth Act, covering complaints about ACT Government Directorates and agencies)
- *Public Interest Disclosure Act 2012 (ACT)* (covers whistle-blower complaints).

Other complaint and review bodies

There are a number of Commonwealth agencies (listed below) whose functions include dealing with complaints, reviewing agency decisions or regulating an industry or some form of conduct. These agencies are independent of the agencies or businesses whose actions they oversight and they have specific statutory powers that enable them to carry out their functions. In some cases the Ombudsman has jurisdiction over these agencies but in some it does not.

Complaint agencies

- the Office of the Australian Information Commissioner (OAIC)

- the Australian Human Rights Commission (AHRC)
- the Merit Protection Commissioner (MPC) and the Parliamentary Service Merit Protection Commissioner (PSMPC)
- the Australian Commission for Law Enforcement Integrity (ACLEI)
- the Inspector-General of Intelligence and Security (IGIS)
- the Office of the Aged Care Commissioner (AGECC)
- Inspector-General of Taxation
- the Tax Practitioners Board.

Regulatory agencies

- the Australian Securities and Investments Commission (ASIC)
- the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER)
- the Office of the Migration Agents Registration Authority (Office of the MARA)
- the Australian Prudential Regulation Authority (APRA)
- the Civil Aviation Safety Authority (CASA)
- the Australian Maritime Safety Authority (AMSA)
- the Australian Fisheries Management Authority (AFMA)

Review agencies

- the High Court (HC)
- the Federal Court (FCA)
- the Federal Circuit Court (FMCA)
- the Administrative Appeals Tribunal (AAT) (incorporating the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal)
- the Veterans' Review Board (VRB)
- the Superannuation Complaints Tribunal (SCT)
- the Office of the Australian Information Commissioner (OAIC)

Even where the Ombudsman has jurisdiction to investigate the actions of such a body, as a matter of policy, the Ombudsman would generally decide not to investigate certain actions, for example:

- decisions by a body about whether a matter falls within its complaint priorities
- decisions of an expert body on a matter within its area of responsibility and expertise
- the way a tribunal member conducted a hearing or the decision made following a consideration of available material
- determinations that affect the way in which an industry or an individual business does something.

This policy recognises that Parliament has given a particular responsibility to these bodies, and provided them with appropriate powers and mechanisms for judicial or merits review. It recognises that investigation by this office would not be warranted where a matter has been properly reviewed by a body entitled to do so. **This policy is not legislation to be applied in every relevant case**. It is appropriate and legally necessary for Ombudsman delegates to consider on a case-by-case basis whether to investigate, but the policy should be given considerable weight. There will be instances where investigation may be appropriate, for example:

- a really bad and otherwise incurable failure to deal with the issue before the body

- a process that is markedly and unreasonably unfair or oppressive
- a decision that is on its face outside the realm of what might be considered to have any reasonable basis.

The Ombudsman's office may, unless there are other reasons not to do so, investigate routine administrative actions (such as replying to correspondence, issuing tenders) taken by one of these bodies. IOs need to be aware that decisions of courts and the AAT are not within the Ombudsman's jurisdiction.

Immigration Ombudsman jurisdiction and enhanced immigration and detention role

Under changes to the Ombudsman Act in 2005, the Commonwealth Ombudsman, in performing functions in relation to immigration and detention, may use the title 'Immigration Ombudsman'.

In addition to dealing with approaches regarding immigration matters, this office also undertakes the following activities in relation to immigration, including:

- monitoring and analysis of compliance activities undertaken by the Department of Immigration and Border Protection (DIBP)
- reviewing and reporting on the cases of detainees who have spent more than two years in immigration detention to the Minister for Immigration and Border Protection
- monitoring of the non-statutory refugee assessment process for irregular maritime arrivals
- monitoring of Christmas Island immigration detention facilities
- monitoring of mainland immigration detention facilities.

Defence Force Ombudsman jurisdiction

The Defence Force Ombudsman (DFO) has the same general powers and authority to investigate or not to investigate under the Ombudsman Act as the Commonwealth Ombudsman, but special provisions apply. The significant differences are:

- The DFO can investigate the actions and/or decisions of the Australian Defence Force (ADF), Department of Defence (DoD), Defence Housing Authority (DHA) and Department of Veterans' Affairs (DVA) that arise from a member's service in the Australian Defence Force. This includes, but is not limited to, decisions about postings, promotions, payment of salary and allowances, debt recovery, discharge, approval of leave redresses of grievance (ROG) processes, allocation and maintenance of housing and decisions relating to claims for compensation, service or disability pensions. Approaches by serving members, former members and their families can be considered.
- The DFO cannot investigate action connected to proceedings under the *Defence Force Discipline Act 1982*
- While the DFO can investigate complaints about the grant, delay or refusal to grant a campaign or service medal to an individual member of the ADF (generally an award to members in a particular place or situation for a specified period), the DFO cannot investigate complaints about decisions in relation to individual honours and awards (that is, a bravery award).

See s 19B-19F of the Ombudsman Act for more detail.

Overseas Students Ombudsman jurisdiction

The *Education Services for Overseas Students Legislation Amendment Act 2011* amended the Ombudsman Act with effect from 9 April 2011 to establish the Overseas Students Ombudsman (OSO). The jurisdiction of the Commonwealth Ombudsman was extended to include overseas students of private registered providers to give them access to a statutorily independent complaints body.

Registered private providers are required to have arrangements in place for a person or body independent of, and external to, the registered provider to hear complaints or appeals arising from the provider's internal complaint and appeals process, or to refer students to an existing body where that body is appropriate for the complaint or appeal.

Prior to the creation of the OSO, overseas students of private registered providers did not have recourse to a statutorily independent external body, such as an ombudsman, competent to hear and investigate student complaints in a consistent and quality-assured manner. The extension of the jurisdiction of the Commonwealth Ombudsman addressed that gap.

In addition to investigating complaints, the Commonwealth Ombudsman provides advice and training to private registered providers to facilitate best practice complaint handling. The Commonwealth Ombudsman also reviews and investigates complaint handling and may report on broader systemic issues across the international education sector.

The OSO must transfer a complaint where he or she forms the view that a statutory complaint handler has the function of investigating, reviewing or enquiring into the action complained about.

The OSO also has discretion to transfer a complaint to another statutory office holder if he or she forms the view that the complaint could be dealt with more conveniently or effectively by the other statutory office holder. The discretion can be exercised before or after the OSO has started investigating the complaint. Two examples of a statutory office-holder to which it is envisaged a complaint may be transferred is the Office of the Australian Information Commissioner (to the Privacy Commissioner) and the Fair Work Ombudsman.

The OSO jurisdiction covers more than 1100 registered private education providers in Australia. 'Registered' means that the provider is on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS), administered by the Department of Education.

An overseas student is someone who holds a student visa to study in Australia, and includes an intending overseas student, or an accepted student (within the meaning of the *Education Services for Overseas Students Act 2000*).

Postal Industry Ombudsman jurisdiction

The Commonwealth Ombudsman is also the Postal Industry Ombudsman (PIO). As PIO, the Ombudsman deals with service delivery matters relating to Australia Post and registered Private Postal Operators (PPOs).

Below is some general information about the office's PIO function. More detailed information about investigating postal industry complaints can be found on the PIO agency intranet page.

Agency

The PIO can investigate complaints about Australia Post, or PPOs that have registered with the PIO. A list of registered PPOs is on the intranet and internet sites. Each PPO is available as an agency in *Resolve*.

The PIO can also investigate the actions of other organisations or people if they are providing a postal service under a contract with Australia Post or a registered PPO, on the PPO's behalf. The PIO's jurisdiction also extends to subcontractors (that is, businesses that are providing a postal service under a contract with another business who is contracted to Australia Post or a registered PPO).

Further enquiries might be needed to find out whether a particular business was operating under a contract with Australia Post or a registered PPO at the relevant time; for example if a contractor operates under contracts with various courier companies, only some of which are registered PPOs.

Investigations into the actions of contractors are conducted as if the action of the contractor was the action of the primary PPO.

Action

Under the Ombudsman Act, the PIO can only investigate complaints about an action that is "with respect to the provision of a postal or similar service". While the Act makes it clear that this includes courier and packet or parcel carrying services, there is no further definition of "postal or similar service".

This office interprets the term "postal or similar service" to mean a service to the public of accepting mail or a package or parcel for the purpose of delivery, at a cost, to a person whose address is specified. The jurisdiction of the PIO extends to any activity of the organisation in discharge of or connected to that postal role, including:

- acceptance and delivery of the postal article
- maintaining the security of that postal article
- transporting or arranging for the transport of that postal article
- retaining a postal article for collection by an addressee.

Under this interpretation, the PIO would not normally look at unaddressed ('junk') mail. The PIO cannot investigate activities of a postal operator that are not related to a postal or similar service (for example, employment matters).

The PIO cannot investigate actions that happened more than 12 months before the complaint was made. These are out of jurisdiction.

The PIO cannot investigate complaints that are made by a registered PPO or Australia Post about an action taken by another registered PPO or Australia Post. If a registered PPO is complaining about Australia Post, then any investigation must be done as Commonwealth Ombudsman.

The Commonwealth Ombudsman can only look at action that relates to "matters of administration". The PIO does not have this limitation.

Timing

The PIO cannot look at actions that happen before a PPO is registered, even if the complaint is made after registration. All PPOs start with a blank slate, and we can only investigate complaints about actions that occur after a PPO registers with the PIO scheme.

The date a PPO is registered is listed on the PPO Register on the PIO website and on the intranet. If a complaint is about a series of actions, some of which took place after registration and some before, we can technically only look at those aspects of the complaint that relate to action after registration. This is particularly important in relation to making recommendations and using our formal powers.

A PPO can de-register from the scheme at any time. However we can still look at actions that took place before the PPO de-registers, as long as the complaint is made within 12 months of the action. The Act in its entirety continues to apply to this complaint until it is finalised (this includes fees).

These provisions are intended to prevent PPOs de-registering to avoid a particular complaint. The date of a PPO de-registration is listed on the PPO Register on the PIO website.

Interaction with Commonwealth jurisdiction

Australia Post is subject to both Commonwealth and PIO jurisdiction. Normally, complaints about postal services would be handled by the PIO. This includes activities that are incidental to postal services, for example the re-direction of mail, and insurance of postal items.

The Commonwealth Ombudsman handles complaints that are about Australia Post's other activities; for example POSTbillpay services, money orders, or agency arrangements. The Commonwealth Ombudsman also has broader powers than the PIO; for example, the power to enter premises. On rare occasions it may be appropriate to transfer a complaint about Australia Post's postal service to the Commonwealth Ombudsman in order to access those powers.

Complaints where both postal and non-postal issues stem from the same action should be under the jurisdiction of the root cause wherever possible. For example, a complaint about both a mail re-direction, and subsequent rudeness of the Customer Contact Centre staff, would normally be dealt with by the PIO.

The PIO and Commonwealth Ombudsman have express powers to transfer to each other if, in the opinion of the PIO (or the Commonwealth Ombudsman, as the case may be), it would be more appropriate to deal with the complaint in his capacity as either Commonwealth Ombudsman (or PIO). The delegation to use this transfer power is held at all levels. When this transfer power is used, the complainant must be informed in writing. The current approach is then closed, and the outcome "transfer to COMB / PIO" recorded against the approach. A new approach in the new jurisdiction is then created.

As we do not deal with many formal transfers you should discuss with your supervisor before formally transferring a case.

Law Enforcement agencies—jurisdiction

The Ombudsman has a specialised role in reviewing the handling of complaints about Australian Government law enforcement agencies and oversighting the use by agencies of coercive and intrusive powers. The relevant law enforcement agencies are the Australian

Federal Police (AFP), Australian Crime Commission (ACC) and the Australian Commission for Law Enforcement Integrity (ACLEI).

In performing functions in relation to the AFP, the Ombudsman may be called the Law Enforcement Ombudsman. The Ombudsman must review the comprehensiveness and adequacy of AFP complaint handling at least once a year, and reports to the Parliament annually. The *Australian Federal Police Act 1979* provides a legislative framework for the AFP to deal with complaints about its members and practices. We usually expect people to raise their concerns with the AFP in the first instance.

Law enforcement approaches

Quick Checklist: Law enforcement jurisdiction

Agency	*Legislation*	Investigative function
Australian Federal Police (AFP)	*Ombudsman Act 1976*	Complaints made about AFP members, including internal complaints Complaints made about AFP practices and procedures
	Australian Federal Police Act 1979	Review of AFP complaint handling and annual report to Parliament
	Australian Security Intelligence Organisation Act 1979	Complaints about AFP members relating to search of property, detention and questioning of suspected terrorists (investigated under Ombudsman Act)
Australian Crime Commission (ACC)	*Ombudsman Act 1976*	Complaints about administrative decisions of the ACC
Australian Commission for Law Enforcement Integrity (ACLEI)	*Ombudsman Act 1976*	Complaints about administrative decisions of ACLEI

Private Health Insurance Ombudsman jurisdiction

The role of the Private Health Insurance Ombudsman (PHIO) is to protect the interests of people covered by private health insurance. PHIO carries out this role in a number of ways, including providing an independent complaints handling service, an education and advice services for consumers and providing advice to industry and government about issues of concern to consumers.

The PHIO can deal with complaints from health fund members, health funds, private hospitals or medical practitioners. Complaints must be about a health insurance arrangement.

The PHIO publishes reports and consumer information about private health insurance.

PHIO also manages the website www.privatehealth.gov.au that provides information about private health insurance and compares selected features for all private health insurance products offered in Australia.

ACT Ombudsman jurisdiction

The Commonwealth Ombudsman is the ACT Ombudsman until the ACT appoints its own Ombudsman (see Part 3 of the *Ombudsman Act 1989 (ACT)* and s 28 of the *Self-Government (Consequential Provisions) Act 1988 (ACT)*

Generally, ACT approaches are treated in the same way as Commonwealth approaches. Sections 8, 9 and 11 of the ACT Ombudsman Act are the equivalents of s 7A, s 8 and s 9 of the Commonwealth Act, and s 18, s 19 and s 20 are the equivalents of ss 15-17.

The *Ombudsman Act 1989 (ACT)* is similar to the Commonwealth Act in regard to jurisdiction. However, some specific areas are additionally excluded from the jurisdiction of the ACT Ombudsman:

- actions taken by a Judicial Commission under the *Judicial Commissions Act 1994*
- s 5(2)(g)—action taken by the Commissioner for the Environment
- s 5(2)(h)—actions taken by a Territory authority for the management of the environment. These complaints fall within the jurisdiction of the ACT Commissioner for the Environment. However the ACT Ombudsman can look at administrative issues.
- S 5(2)(i) and s 5(2)(m)—actions taken by the ACT Human Rights Commission and action taken by an agency related to providing (or refusing to provide) a disability or health service or services for older people and children and young people

Where a complaint is made about any of those areas and most appropriately dealt with by a relevant specialist body, it **must** be transferred to that body. See section 2.3 Transferring matters externally.

ACT whistle-blower approaches

The ACT Ombudsman also has a special role under the *Public Interest Disclosure Act 2012 (ACT)* in dealing with whistle-blower approaches about ACT agencies.

The Public Interest Disclosure Act provides a vehicle for any member of the public, including ACT public servants, to report wrongdoing in the ACT public sector. The ACT Ombudsman is a proper authority to receive and investigate such disclosures, which include: dishonesty or bias, misuse of official information, negligent or improper management of government funds, trying to influence a public official to act improperly and victimising a person because they have made a public interest disclosure.

For further information, see section 2.2 *Whistle-blower approaches*.

ACT Freedom of Information approaches

Unlike the Commonwealth jurisdiction, the ACT Ombudsman has a significant role under the *Freedom of Information Act 2016 (ACT)* in the handling of FOI reviews and complaints about how ACT agencies have managed an FOI request.

Agencies and actions within jurisdiction

Agencies within jurisdiction

The Ombudsman Act authorises us to investigate actions taken by departments and prescribed authorities, specifically:

- Australian Government departments

- agencies listed in Schedule 2 of the Regulations of the Ombudsman Act (e.g. the Australian Institute of Sport, the National Health and Medical Research Council, Anutech Pty Ltd)
- the Australian Defence Force
- the Australian Federal Police
- Commonwealth court registries/registrars (but judicial actions and delegated judicial actions are excluded, e.g. a Family Court registrar's delegated judicial actions). **Note:** administrative matters are within our jurisdiction where they are not a directive of the Federal Magistrate or Judge. See (section 1.5) Judicial matters for more detail.
- Commonwealth-controlled companies which came into existence on or after 15 March 1994
- parliamentary departments
- most prescribed statutory authorities.

The Ombudsman Act also authorises us to investigate actions taken by registered private postal operators and registered private education providers.

Sections 3 and 3A of the Ombudsman Act define prescribed authorities in more detail. The Ombudsman Regulations should also be considered when determining whether a body is a prescribed authority.

If you are unsure whether an approach is within jurisdiction, you should contact the Legal Team about whether the agency is within jurisdiction. If they are unable to provide confirmation one way or the other, they may recommend that you contact the agency, using s 7A of the Ombudsman Act to seek further information with a view to determining whether or not the agency is within our jurisdiction.

Actions/decisions within jurisdiction

For our purposes, there are three general types of actions/decisions:

- administrative — under our Act, the Ombudsman is authorised to investigate actions that relate to ‘a matter of administration’.
- legislative — in very limited circumstances we can investigate issues related to reasonableness of the law and legislative matters where a rule or provision of an enactment may be unreasonable, unjust, oppressive or improperly discriminatory.
- judicial — the Ombudsman is **not** authorised to investigate judicial (including criminal) matters.

Section 5 of the Ombudsman Act has more detail about these types of actions/decisions.

The concept of ‘administration’ covers a broad range of activities—for example, the decisions or actions of individual officers or implementation of departmental policies. When deciding if complaints about policy issues are within our jurisdiction, consider this distinction:

- Approaches about the content and direction of 'high level' Government policy are generally outside our jurisdiction.

- Approaches about any departmental policies developed to implement the Government's legislated and announced policies (administrative policy) are within our jurisdiction. The exception is when departments are implementing a Ministerial decision, for example, if a Minister makes a determination to charge a fee for a departmental service, such as issuing visas.

If we do pursue legislative and government policy matters, we usually deal with them as special projects or systemic issues (see Chapter 3—Complex and systemic issues).

However, s 5 pf the Ombudsman Act does not apply to the PIO and as a result the PIO is not limited to investigating matters of administration but rather limited to actions that relate to a 'postal or similar service'. Section 19M of the Act sets out the functions of the PIO.

Agencies and actions outside jurisdiction

Even if the Ombudsman has jurisdiction over the agency or decision maker, you need to consider whether the subject area of the approach falls outside our jurisdiction. The two principal areas outside our jurisdiction are employment-related and judicial matters:

It cannot be overemphasised that if you are unsure whether an approach is within jurisdiction – be it the agency complained about or the action complained of – you should contact the Legal Team to seek their advice. If they are unable to provide confirmation one way or the other, they may recommend that you contact the agency, using s7A of the Ombudsman Act to seek further information with a view to assist us in forming a view as to whether or not we have jurisdiction.

Employment-related matters

The Ombudsman is not authorised to investigate employment-related matters regarding *employees of the Australian Public Service or a prescribed authority (s 5(2)(d) of the* Ombudsman Act). Employment related matters are described as including promotion, termination, discipline and remuneration, although this list is not exhaustive.

The Ombudsman Act is not definitive about the investigation of actions that have some relationship to employment therefore decisions on investigating an employment-related matter rests with the relevant SAO. The Act provides an exclusion that clearly covers some actions as noted above. However the exclusion does not apply to actions that:

- occurred before the person was employed;
- occurred after the person ceased to be employed (although it may be impossible to investigate where an action relies on something that happened during employment)
- are no more than incidentally related to employment, such as the payment of compensation or superannuation (but not actions related to return to work programs, light duties etc.).

Another body such as the Merit Protection Commissioner, the Fair Work Commission and/or the Fair Work Ombudsman may review some employment actions. The availability of other avenues for review is a factor in determining whether to investigate a matter. However the absence of other review avenues is not generally sufficient reason for investigating a matter that is out of jurisdiction.

The Ombudsman has a clear role as Defence Force Ombudsman to deal with employment actions taken in relation to members of the Australian Defence Force. The ACT Ombudsman may become involved in employment actions when dealing with a matter under the *Public Interest Disclosure Act 2012 (ACT).*

The Ombudsman may also have jurisdiction in relation to AFP employment matters where the complaint relates to action taken by an AFP appointee in relation to information given to another AFP appointee that raises an AFP conduct or practice issue.

When recording an employment-related case on *Resolve* you will need to determine the applicable sub-category. The first level issue is 'Employment' followed by a number of sub-categories:

- 'Employment recruitment': this relates to matters including the advertisement of a position, shortlisting, selection of a preferred applicant and pre-employment arrangements with that person.
- 'Post-employment': this relates to matters including: action taken after the person ceased to be an employee, where investigation is possible without investigating some matter during or related to employment.
- 'Employment incidental': this relates to matters including the payment of superannuation or compensation benefits to an employee or former employee.

Judicial matters

The Ombudsman is expressly precluded from investigating actions of court/tribunal CEOs and others (e.g. registrars) where they are exercising the powers of the court or powers of a judicial nature (s 5(2)(ba) of the Ombudsman Act).

The types of approaches about courts and tribunals that normally fall within our jurisdiction are approaches about the administrative processes of their registries. If you are unsure, check the jurisdiction of approaches about court or tribunal registries with the Legal Team.

Decision makers outside our jurisdiction

People and bodies outside our jurisdiction are outlined below. If you are unsure about whether a decision maker is outside jurisdiction, ask for advice from the Legal Team.

- Parliament—this includes all actions that form part of the proceedings of Parliament, including Committee matters.
- Ministers—while we are not authorised to investigate actions taken by Ministers, we can investigate decisions made by public servants using Ministerial delegations. We can also investigate actions taken by departments in relation to Ministerial decisions and advice to Ministers.
  Note: bring these matters to the attention of the relevant SAO , Deputy Ombudsman (DO) or Ombudsman before deciding whether or not to investigate the complaint.
- Judges and Justices—we cannot investigate actions taken by a Justice or Judge of a court created by Parliament.
- Magistrate or Coroner—the Ombudsman is not authorised to investigate action taken by a magistrate or coroner for the ACT, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands, or a person who holds office as a magistrate in a State or the Northern Territory.
- Certain investigative bodies—this refers to any Commonwealth body that can take evidence on oath and is required or expressly permitted to include a Judge among its members, e.g. Administrative Appeals Tribunal (AAT) and Royal Commissions.
- Bodies specified in the Ombudsman Regulations 1977—even when a body is otherwise within jurisdiction, the Act provides that it may be specifically excluded from jurisdiction (e.g. ASIO). These bodies are contained in Schedule 1 of the Ombudsman Regulations.

- ACT Government departments and agencies—in the ACT, the Ombudsman is excluded from investigating action related to the provision of a disability or health service; such cases must be referred to the ACT Human Rights Commission.

1.6 Legislation

The office has developed quick checklists summarising key sections of the main Acts that guide our work.

Ombudsman Act 1976

Key sections of the Ombudsman Act

Jurisdiction

- Section 3—definition of 'prescribed authority' including bodies that are not prescribed authorities and not within jurisdiction.
- Section 5 (1)(a)—the Ombudsman shall investigate actions related to matters of administration.
- Section 5 (1)(b)—the Ombudsman may conduct own motion investigations.
- Section 5 (2)—details actions of certain persons or bodies that the Ombudsman may not investigate.
- Regulations, Schedules 1 to 4—list of prescribed and non-prescribed bodies.

Deciding not to investigate

- Section 6—circumstances and reasons why the Ombudsman may decide not to investigate particular complaints. However, note that s 6(2) comes at things the other way in that it prohibits the undertaking of an investigation unless there are special reasons justifying the investigation.
- Section 7(2)—where a written complaint has been requested but not received the Ombudsman may decline to investigate or to investigate further.

Preliminary inquiries

- Section 7A(1)—preliminary inquiries may be made to decide whether or not to investigate a complaint.
- Section 7A(2)—the Ombudsman may make arrangements with principal officers of agencies to direct inquires to specified officers in agencies.

Note: The office policy, confirmed in July 2014, is that s 7A should only be used to determine jurisdiction (agency or action complained of). Otherwise s 8 should be used to obtain information from an agency as part of an investigation.

Investigations

- Section 8(1)—before starting an investigation, the Ombudsman shall inform the principal officer of the relevant agency.
- Section 8(1A)—the Ombudsman may make arrangements with principal officers of agencies regarding how notice is given about the start of investigations.
- Section 8(2)—investigations shall be conducted in private and in a manner that the Ombudsman thinks fit.
- Section 8(3)—the Ombudsman may obtain information from such persons, and make such inquiries, as the Ombudsman thinks fit.

- Section 8(5)—reports that are critical of agencies or persons are not to be made unless the criticised agency or persons have been given the opportunity to make submissions in regard to the criticisms.

Powers

- Section 9(1)—the Ombudsman may issue a notice requiring a person to provide information in writing or to provide documents or other records.
- Section 9(1A)—the Ombudsman may copy, take or retain documents requested in accordance with Section 9(1).
- Section 9(2)—the Ombudsman may require a person to attend at a specified place and answer questions relevant to the investigation.
- Section 13—the Ombudsman may examine a person under oath or affirmation.
- Section 14—an authorised person may enter premises occupied by a Department or prescribed authority and may carry out an investigation at the place.

Notice of no further investigation

- Section 12(1)—when the Ombudsman does not investigate or continue to investigate a complaint then they shall, in a manner they think fit, inform the complainant and the agency of the decision and the reasons for it.
- Section 12(2)—the Ombudsman can make arrangements with agencies about how they will be notified of a decision not to investigate or continue to investigate or when that notice is not required.
- Section 12(4)—the Ombudsman can make comments or suggestions about an issue arising from an investigation to a Department, body or person

Reports

- Section 15—details about reports to agencies where the Ombudsman believes defective administration has occurred and some further action is required by the agency.
- Section 16—when an agency does not adequately respond to the Ombudsman's s 15 report, the Ombudsman may inform the Prime Minister in writing.
- Section 17—when the Ombudsman has provided a report in accordance with s 16, copies may also be provided to Parliament.
- Section 18—after reporting in accordance with s 17, the Ombudsman may discuss matters in the report with the principal officer of the agency in question, for the purpose of resolving the matter.

Defence Force Ombudsman

- Section 19C(2)—the Defence Force Ombudsman shall investigate complaints and may conduct own motion investigations.
- Section 19C(3)—the Ombudsman is authorised to investigate administrative matters that relate to the service of a member of the Defence Force or in consequence of a person having served in the Defence Force.
- Section 19C(5)—details which actions the Defence Force Ombudsman is not authorised to investigate (such as actions by Ministers and Judges).
- Section 19E—deciding not to investigate complaints where redress has not been sought or is yet to be determined.

- Section 34(2)— the Defence Force Ombudsman may delegate all or any of his powers other than those powers under s 15, 16 and 17 and those powers referred to in s19F(3).

Overseas Students Ombudsman

- Part IIC—establishment, functions, powers and duties of the Overseas Students Ombudsman
- Section 19ZJ—functions of the Overseas Students Ombudsman
- Section 19ZK—transfer of complaints
- Section 19ZL—discretion not to investigate certain complaints
- Section 19ZN—powers of the Overseas Students Ombudsman under s 9
- Section 19ZO—duty to accord procedural fairness
- Section 19ZP—disclosure of identifying information
- Section 19ZQ—Overseas Students Ombudsman may report to private registered provider
- Section 19ZR—Minister to table certain reports in Parliament
- Section 19ZS—annual reports
- Section 19ZT—Overseas Students Ombudsman may notify of misconduct

Postal Industry Ombudsman

- Part IIB—establishment, functions, powers and duties of the Postal Industry Ombudsman
- Section 19M—functions of the Postal Industry Ombudsman
- Section 19Q—discretion not to investigate certain complaints
- Section 19R—application of other provisions of the Ombudsman Act to the Postal Industry Ombudsman
- Section 19S—powers of the Postal Industry Ombudsman under s 9
- Section 19T—duty to accord procedural fairness
- Section 19U—disclosure of identifying information
- Section 19V—Postal Industry Ombudsman may report to Australia Post or registered private postal operator
- Section 19W—Minister to table certain reports in Parliament
- Section 19X—annual reports
- Section 19Y—Postal Industry Ombudsman may notify of misconduct

Private Health Insurance Ombudsman

- Part IID—powers and functions of the Private Health Insurance Ombudsman

Delegations

- Section 34(1)—the Ombudsman may delegate any of his powers under this Act, except the powers under s 15, 16, 17 and 19 and this power of delegation.

Confidentiality

- Section 35—officers and former officers shall not disclose information obtained in the course of their work except as required in the course of the performance of duties as an officer exercising powers under this Act.

Disclosure of information

- Section 35A—the Ombudsman may disclose information about the performance of the functions of, or investigations by, the Ombudsman under this Act if, in their opinion, it is in the interest of the agency or in the public interest.

Offences

- Section 36—details offences and penalties for people who refuse or fail to provide information to the Ombudsman.

Protection from civil actions

- Section 37— if a person complains or provides information to the Ombudsman in good faith, civil proceedings cannot be laid against that person in relation to providing that information.

Ombudsman Act 1989 (ACT)

Key sections of the ACT Ombudsman Act

- The Commonwealth Ombudsman is the ACT Ombudsman until the ACT appoints its own Ombudsman (see Part 3 of the *Ombudsman Act 1989 (ACT)* and s 28 of the *ACT Self-Government (Consequential Provisions) Act 1988*.
- The ACT Ombudsman Act is the same as the Commonwealth Act in many areas. However, there are additional areas outside the jurisdiction of the ACT Ombudsman.

1.7 Delegations

The Ombudsman has extensive investigation and coercive powers.

Under the Ombudsman Act, the following powers can only be exercised personally by the Ombudsman (or Acting Ombudsman):

- a report to an agency under s 15
- a report to the Prime Minister (s 16)
- a report to the Parliament (s 17, 19)
- delegation of a power.

Delegated powers

To facilitate the handling of the high volume of approaches the office receives each year, the Ombudsman delegates many of his powers to other officers. Separate delegations exist under the various Acts relevant to our complaint work:

- *Ombudsman Act 1976*
- *Ombudsman Act 1989 (ACT)*
- *Freedom of Information Act 1989 (ACT)*
- *Public Order (Protection of Persons and Property) Act 1971*

- *Public Interest Disclosure Act 2013*

Check the list of delegations on the intranet to make sure you hold the relevant delegation under the Act before using that power. If in doubt, contact the Legal Team for advice.

Delegate's role—legal principles

A delegate is expected to bring an open and independent mind to any action they take in exercise of their delegated power. Any decision they make should be one they have reached personally, and not at the direction or dictation of any other person. The views of other officers and the policies of the organisation should be considered, but must not overshadow the obligation of the delegate to treat each decision or action as one requiring a genuine consideration of all relevant matters.

Under the Ombudsman Act the Ombudsman alone has the power and responsibility of issuing a s 15 report and reporting the work of the office to government and the parliament. It necessarily follows that the Ombudsman can exercise a close degree of control over the investigation work of the office, to the point of providing instruction on what matters are to be investigated and the depth and length of investigations. Necessarily, the Ombudsman works through other senior officers and expects them to exercise close supervision of the investigation work of the office. In a strict legal sense, the delegates of the Ombudsman are filtering what needs to be done to inform and shape the opinions of the Ombudsman.

The legal principles on delegation are largely concerned with how the "final" decision is made (for example, to accept or reject an application) but do not preclude dictation and direction in the preparatory stages of decision-making. For example, it is open to a senior officer to require a delegate to consult with them, or to transfer the responsibility for making a decision from one officer to another. If concerned about a decision a delegate proposes to make, managers can transfer the case to themselves and make what they believe to be the correct decision, or transfer to the case to another delegate.

1.8 Obligations

Procedural Fairness

The Ombudsman Act prevents us from expressing critical opinions about people or agencies unless they have had the opportunity to make submissions to us about the matter. The concept of procedural fairness also applies to other aspects of our investigations. This section deals with the two basic elements of procedural fairness—avoiding bias and conflict of interest, and providing a fair hearing.

Bias and conflict of interest

The rule against bias covers actual bias and reasonable apprehension of bias. Our decisions should be seen by both complainants and agencies to be impartial and independent.

We are bound by s 13(7) of the *Public Service Act 1999*, which requires us to 'disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent)' in connection with our duties.

In addition, the Australian Public Service Commission Guidelines on official conduct provide guidance on pecuniary (financial), personal and other interests. The strongest foundation for an allegation of bias is pecuniary interest. Personal interests include decisions that directly affect someone the decision maker has a relationship with. Our Guidelines for managing the potential for a perceived lack of impartiality in decision making provide more details specific to our work.

A conflict of interest exists, or may be perceived to exist, when it appears likely that a staff member could be influenced, or where it could be perceived that they are influenced, by a personal interest in carrying out their duty. Examples include dealing with an approach where our staff members:

- have a personal or social relationship with the complainant, agency staff managing the investigation, or people named in the complaint being investigated
- are in dispute with or seeking assistance from the agency in question
- are known to hold views on a subject that suggest they may not have an open mind about the issue
- make inappropriate personal or prejudicial comments about the complainant or others involved
- have previously worked for, or have been seconded from, the particular area of the agency in question
- have dealt with another complainant about the same case, e.g. Child Support payee and payer.

If you believe there could be a conflict of interest—for yourself or one of your colleagues—speak to your manager. Where there is any doubt, staff and their managers have several options:

- allocate the investigation to another staff member without providing more information than necessary about the issue that has arisen
- if the staff member has particular skill or knowledge or if the investigation is well advanced, leave the investigation with them but require the potential conflict be brought to the attention of the complainant and the agency so they can review their positions
- if the conflict appears neither real nor substantial, make a record within *Resolve* that the discussion has occurred.

If the matter remains unresolved, raise it with the relevant SAO. Sometimes complainants accuse us of bias or a conflict of interest. While there may be no grounds for their perception, always inform your manager to determine what action (if any) should be taken.

The right to a fair hearing

The right to a fair hearing includes:

- **the right to reasonable notice of any hearing**—allow sufficient time for the complainant or agency to develop necessary arguments. In the case of oral advice, this involves explaining your reasons and allowing the caller the opportunity to respond at the time of the call. They may request written advice, or time to gather their thoughts and get back to you.
- **the right to know the basis for the decision**—this includes any critical matters on which the decision will turn, and the reasons for the decision
- **the right to put one's case**—the statutory right under s 8 (5) of the Ombudsman Act allows people and agencies who are criticised the choice of making an oral or written submission before we proceed with a formal report under s 15. This does not necessarily mean that a person is entitled to legal representation. Nevertheless, it may be prudent to allow the presence of a lawyer where we are questioning under oath and the issues have been controversial. More information is contained in section 3.4 Coercive powers.
- **the right to respond to information obtained from another source that is credible, relevant and significant to the decision**—this includes indirectly

prejudicial material, but does not apply to undisputed statements of fact and information provided by the person themselves.

The right to a fair hearing applies in all cases where we make a decision that affects somebody's interests, including deciding:

- not to investigate, or not to continue investigating
- that no further action is warranted (for example, no further correspondence)
- to provide a formal report to the agency under s 15 of the Ombudsman Act, when the Ombudsman believes some further action is required (noting procedural fairness and s 8 (5) of the Ombudsman Act (see section 3.8), which requires that agencies first have the opportunity to make submissions to us).

You should consider the principles of procedural fairness in all aspects of your dealings with agencies, complainants and third parties who may be the subject of direct or implied criticism—for example, by offering people the opportunity to comment on written advice about a decision not to investigate, and informing people of their review rights.

Rights to reasons

It is essential that we clearly explain to both complainants and agencies the reasons for decisions in our investigations.

Where the approach is handled orally, this can usually be done over the phone. **Note:** you must record the discussion in *Resolve*.

For approaches handled in writing, provide reasons for decisions in closing letters to the complainant and agency. The detail must be sufficient to meet the requirements of s13 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

All decisions based on a statutory power are subject to judicial review by the Federal Court under the ADJR Act. Section 13 of the Act allows anyone affected by such decisions to seek a formal statement of reasons. Such a statement must contain:

- the findings on material questions of fact
- the evidence on which those findings were based
- reasons for the decision.

Officers who receive a formal request for a statement of reasons must notify their Director and contact the Legal Team for advice. Once a statement of reasons has been requested, the decision maker has a statutory time limit of 28 days to respond. Further information about providing a statement of reasons is available in section 4.4 Responding to requests for formal statement of reasons.

Right to review

Although people have no statutory right to seek internal review of our decisions, we do offer them a review if they remain dissatisfied after an IO has reconsidered their decision not to investigate or not to investigate further.

In some circumstances they may also have external avenues of review or complaint.

Our internal review process provides dissatisfied complainants with an opportunity to seek a fresh evaluation of a decision made by our office. For example, complainants may seek review of a decision to decline to investigate an approach, or a review of the outcome of an investigation (where the complainant is not satisfied with the remedies achieved and/or the decision not to investigate further).

Our internal review process is consistent with the principles of procedural fairness and acknowledges that it is possible for us to make mistakes or overlook important information in the course of an investigation. The internal review process also enables us to learn from our mistakes in order to continuously improve our work practices and service delivery across the office.

A review is not a re-investigation of a complaint, but looks at the process adopted by the IO and the merits of the IO's conclusion. When requesting a review, complainants should be advised to clearly identify why they consider the original decision was wrong and, where possible, provide information or evidence in support of their view.

See section 4.3 Internal Reviews for further information.

Handling confidential information

The Ombudsman Act s 8 (2) requires this office to conduct investigations in private. In addition, under s 35 it is a criminal offence to divulge or communicate information obtained during the course of investigations, apart from when:

- disclosure is 'for purposes connected with the exercise of the powers and the performance of the functions of the Ombudsman'—this covers most of our disclosure (for example, forwarding a complaint letter to an agency, or conveying information to the complainant or agency after completing an investigation)
- the provider of the information agrees to disclosure
- information is in a report made under the Act—this includes our Annual Report, public reports, special reports to Parliament and reports to the Prime Minister
- the Ombudsman discloses information about the performance of, or investigations by, the office when it is appropriate and in the interest of the agency or the public
- the Ombudsman Act makes provision for disclosure of certain information in specific circumstances to specific agencies (e.g. to the Integrity Commissioner under s 35AA; see also s 35A, s 35B and s 35C).

When disclosing information for any of these purposes, we must not disclose:

- information which contains any criticisms of an individual or agency which have not been put to the individual/agency for comment—this includes criticisms of third parties
- information if its disclosure is likely to interfere with the investigation concerned, or any other investigation, or with reporting under the Ombudsman Act
- the name of the complainant, or anything that would allow identification of the complainant, unless it is fair and reasonable to do so or permission has been provided by the complainant.

Confidentiality obligations imposed by the Ombudsman Act apply *in addition* to the requirements of the *Privacy Act 1988* (see below).

The Ombudsman is subject to the *Freedom of Information Act 1982.*

Personal information and the Privacy Act

'Personal information' is broadly defined and includes information or an opinion, whether true or not, regardless of how it is recorded, about an identifiable individual or an individual whose identity can be reasonably ascertained. It includes information about a person's name, address, phone number, date of birth, medical history, criminal record, financial, employment and educational details and their tax file number (TFN). However not all

information that we collect in relation to an investigation and which is subject to s 35 of the Ombudsman Act is necessarily personal information.

It is not always necessary to reveal names for people to be identifiable. For example, people in specific groups may be able to identify those referred to by other characteristics.

The Australian Privacy Principles in the *Privacy Act 1988* provide strict safeguards for any personal information handled by Australian Government and ACT Government agencies. These cover the collection, storage, use and disclosure of this information. Generally, for our purposes:

- APPs 1 and 2 outline agency obligations around open and transparent management of personal information and require us to comply with the APPs, have a clearly expressed and up to date APP Privacy Policy and to enable individuals to interact with us anonymously or using a pseudonym. Our APP Privacy Policy explains how an individual may complain to us about our handling of their personal information.

- APPs 3 to 5 apply when we collect or request personal information. You can only collect personal information if it is reasonably necessary for, or directly related to, the functions and activities of the Ombudsman's office, and if the means of collection is lawful, fair and minimally intrusive. You should never claim that a person is obliged to provide information if that is not the case, nor should you seek more information than you need.

  Special rules apply to the collection of 'sensitive information' which is information about a person's race/ethnicity, health/genetic status, political opinions/associations, religious beliefs/affiliations, philosophical beliefs, sexual preferences or practices, trade/professional/union memberships/associations, criminal record and biometric data.

  Personal information should be collected from the individual to whom it relates, however collection from a third party is permitted by the APPs if the individual consents, or we are authorised by law to do so (e.g. under an *Ombudsman Act 1976* investigation), or it is unreasonable or impracticable to collect it from the individual.

- APP 5 sets out what we must tell individuals when we collect their personal information. 'Privacy statements' to this effect can be found on our websites. Unless it is authorised by law, or unreasonable or impractical to do so, we must tell an individual if we collect their personal information from someone else.

- APPs 6 to 9 apply to the use and disclosure of personal information. You can only use or disclose personal information for the purpose for which it was collected (primary purpose) unless in relation to the intended use and disclosure (the secondary purpose):
  - the person has consented
  - the person would reasonably expect that there may be such a use or disclosure and the use or disclosure is related to the purpose for which the information was obtained (the primary purpose). Special rules apply to sensitive information which must be directly related to the primary purpose.
  - it is required or authorised by law
  - it is needed to address a serious and imminent threat to life or health and it is unreasonable or impracticable to obtain consent to disclosure from the individual
  - it is necessary to take action in relation to unlawful activity or misconduct of a serious nature relating to an entity's functions
  - it is necessary to locate a missing person

- Special considerations apply to disclosure of personal information to a person who is not in Australia or an external territory - see APP 8

- APP 10 requires that the personal information we collect is accurate, up to date and complete. This requirement must be considered at the time we collect the information and at any time we use or disclose the information.

- APP 11 relates to the storage and security of personal information. It is a breach of APP 11 if personal information is not securely stored. The office's Security Policy which requires officers to clear approach files and papers from their desks and in-trays and secure them before leaving for the day, is one method by which the office complies with the APPs. We also ensure that personal information is safely stored by requiring staff to access electronic records by use of a personal identification code and password.

- Apps 12 and 13 provides for the right of individuals to seek access to, and correction of their personal information.

In the context of this office staff should ensure that records containing personal information are secured against unauthorised access/use, modification or disclosure and that any use of personal information is clearly related to a business purpose.

A breach of the principles is a breach of a legal requirement that applies to all Government agencies. Additionally, and often more importantly, failure to comply with relevant APPs may cause embarrassment, inconvenience, and loss of entitlements or even physical danger for the person to whom the information relates. Specifically s 15 of the Privacy Act provides that an agency shall not do an act, or engage in a practice, that breaches an APP.

As noted above, the Privacy Act places an obligation on agencies rather than individual officers. However, individuals who commit a breach can be subjected to the discipline provisions of the *Public Service Act 1999* and in some cases could be charged with offences under the *Crimes Act 1914*.

For more information on the application of the APPs refer to the Legal Team.

Agency objections

Agencies sometimes resist providing information to our office on the basis that it may be contrary to the Privacy Act. There are two responses that we can give to this assertion - firstly agencies providing information to the Ombudsman are taken to be authorised by law to do so for the purposes of the Privacy Act – see s8(2D) of the Ombudsman Act; and secondly a person who has complained to us could reasonably expect an agency to disclose information for the purposes of an Ombudsman investigation i.e the 'secondary purpose', (see APPs 6 to 9 above).

In cases where there is no complaint, for example, in an own motion investigation it is usually possible and desirable for disclosures to be authorised under relevant legislation, or as part an official's duty, without the need to issue a formal notice requiring information under s 9 of the Ombudsman Act. However there may be situations that relate to the secrecy or confidentiality provisions of the agency's own legislation where an agency will require the use of our coercive powers. (See section 3.4 Coercive powers for further information.)

There are specific protections for officers who provide information to the Ombudsman, as requested by the Ombudsman, or because the officer reasonably believes the information to be relevant.

In either case evidence of the provision of information may not be produced and used against the officer concerned. The officer is also not liable for any other penalty relating to the provision of information, with the exception being in relation to the provision of false or misleading information.

Also an agency's claim to legal professional privilege is not affected by the provision of information to the Ombudsman.

Collecting personal information

When collecting personal information, take reasonable steps to ensure it is related to our purposes, up-to-date, complete and not unreasonably intrusive. If it is 'sensitive information' then in addition the individual's consent is required and it must be *directly* related to our purposes; or we must otherwise be authorised by law to collect it e.g. for an investigation under the Ombudsman Act – see APP3. Collecting personal information just because it may be useful in the future is not acceptable. It is also inappropriate to reveal personal information about identifiable individuals during informal discussion about cases within the office.

Ensure that complainants understand that there may be circumstances where we have to disclose personal information—this will help them decide what information to volunteer and sometimes even whether to proceed with a complaint. Complainants should be referred to the relevant 'Privacy Statement' on our websites (there are different statements depending on whether the complaint relates to the PIO, OSO, or Commonwealth Ombudsman generally), and be given a copy if necessary in order to ensure we meet our obligations under APP 5.

The following practices breach the Australian Privacy Principles in the *Privacy Act 1988*:

- asking for personal information which is not reasonably necessary for or directly related to our functions and activities (if it is sensitive information then in addition the individual's consent is required except in certain circumstances – see APP 3).
- asking for information that would be against the law to use
- asking a group of people for personal information when we only need information about some of them
- unnecessarily recording information in a way that identifies people.
- recording personal information against the wrong person record in *Resolve*, even mistakenly.

Occasionally, complainants send us personal information that is not necessary or related to our functions. If you receive information not relevant to the investigation, then consider whether it is information that we could have collected and if we are the intended recipient. If we were not the intended recipient and it is not information that we could have otherwise collected in connection with our functions and activities, then consideration should be given to the return or destruction of the information. The Legal Team can give you advice about how restrictions on the destruction of Commonwealth records may apply in these circumstances.

Note: under no circumstances can we collect, use or disclose Tax File Numbers (see *Disclosing personal information* below).

Protecting personal information

The Ombudsman is a trusted custodian of sensitive personal information provided by complainants. It is essential to maintain this sense of trust if we expect complainants to continue to approach us and have confidence in our procedures. Accordingly, access to

personal information within the office, as well as outside the office, should be on a need-to-know basis.

Take reasonable steps to ensure that documents containing personal information are protected from unauthorised access, use, disclosure or loss. Files containing personal information should be stored securely when away from your desk for extended periods. Our Security Policy provides more information about how we manage information and records in the office, including the physical protection of all records through a 'clean-desk' environment.

Officers should not access formal files or database records of specific approaches without good cause. Access is a breach of the APPs relating to use of personal information if not work related

It is appropriate to discuss specific complainant details when seeking advice from managers about approaches, systemic issues or preparing case studies. However, you should not reveal personal information unless it is essential to these discussions.

Disclosing personal information

Obligations—disclosing personal information

Section 35 of the Ombudsman Act imposes a general obligation of confidentiality on staff (see “Handling Confidential Information” above). In addition the APPs impose obligations on agencies in relation to the disclosure of personal information. Also special rules apply in relation to the disclosure of identifying information disclosed under the *Public Interest Disclosure Act 2013*.

Consequently information regarding complainants should not be disclosed to third parties (including agencies) unless it directly relates to the issues under investigation (such as a letter of complaint), or a decision has been made to disclose information under s35A of the Ombudsman Act. The Ombudsman has signed a delegation authorising certain staff to make decisions under s 35A of the Ombudsman Act. If the matter relates to a disclosure under the Public Interest Disclosure Act advice should be sought from the PID Team.

Once you are satisfied that the information can be disclosed for the purposes of an investigation, or a delegate has made a decision to disclose the information under s35A of the Ombudsman Act, then when passing information to a third party, it should be made clear that they cannot use or disclose the information for any other purpose.

As a general rule if a person has stated or implied that information has been given in confidence, their authority should be obtained before the information is passed to a third party and the third party should also be advised of the confidentiality constraints. However there may be circumstances which limit both the restrictions that the person can place on the disclosure, or the ability of the Ombudsman or staff to disclose the information. If you have any doubts you should see advice from the Legal Team before a disclosure is made.

An exception to the above is where providing information to another agency is necessary to prevent a serious and imminent threat to the life and health of an individual. In addition to the Ombudsman, Deputy Ombudsman and Senior Assistant Ombudsmen, all EL2 staff have authority to notify an appropriate agency in this limited circumstances. Where there is a serious and imminent threat to life or health of an individual it would be appropriate to contact agencies able to assess the threat—for example, law enforcement agencies, mental health crisis teams or relevant child protection agencies. It would not be seen as appropriate to contact agencies that deal more generally with welfare issues such as Centrelink social workers or telephone support services.

See *Callers at risk of harming self or others* and *Critical incident procedures and reporting* for more information.

Collecting and disclosing Tax File Numbers

Tax File Numbers (TFNs) must not be solicited from complainants or agencies.

The Privacy Act and associated taxation legislation establishes stringent safeguards relating to TFNs. Under the TFN scheme, it is unlawful to:

- request people to quote their TFN
- record their TFN
- divulge their TFN to others unless such action is authorised by law.

The Tax File Number Guidelines 2011 specify that TFNs are not to be used or disclosed to establish or confirm the identity of any individual, or to obtain or match any other information about them, for any purpose not authorised by taxation or assistance agency laws.

Consequently we must not use TFNs to identify complainants to an agency. Names, addresses and dates of birth are sufficient identification.

There are penalties for breaches of the law relating to TFNs. Besides the penalties for breaches of confidentiality under the Crimes Act, taxation and child support legislation and s 35 of the Ombudsman Act, the *Taxation Administration Act 1953* also provides penalties for unlawful use or disclosure of a TFN.

Even though we should not request TFNs, they do come into our possession via documents provided by complainants and agencies in the course of our investigations. Like other personal information, TFNs must be safeguarded against unauthorised use, which means securely storing files and if possible destroying TFN information as soon as it is received. **Do not record TFNs in *Resolve*.**

If you have any queries, talk with the Legal Team.

Chapter 2—Approach handling

2.1 Before you begin

Before you begin handling approaches, you should be aware of your role and responsibilities as outlined in the previous chapter of these guidelines, and have read our Service charter setting out our service standards.

Quick Checklist: What to remember

- Be aware of our jurisdiction (section 1.5)
- Be aware of your delegations (section 1.7)
- Be aware of our obligations (for example, privacy, confidentiality) (section 1.8)
- Be aware of our contact protocols (below)
- Keep full and accurate records
- Investigate complaints impartially and independently
- Refer to our service charter for complainants' rights
- Refer to our service standards for timeframes (section 1.4)

Complainant's rights

According to our Service charter, complainants have the right to:

- make an approach in the way most convenient to them, whether that is in person, by letter, fax, phone, or via the internet (at times we may need to ask for written information)
- authorise someone else to make an approach on their behalf (but it still may be necessary to contact the complainant)
- make an anonymous approach or use a pseudonym (but not for improper purposes eg to fraudulently obtain another person's information)
- request an internal review of a decision.

Conflict of interest

A conflict of interest exists, or may be perceived to exist, when it appears likely that a staff member could be influenced, or where it could be perceived that they are influenced, by a personal interest in carrying out their duty.

For further discussion about this see section 1.8 *Obligations: bias and conflict of interest*.

Our contact protocols

Quick Checklist: Contact protocols

Contact protocols
• Have regard to a complainant's request that communication be in a particular form (for example, only by letter or only by email) and add the preferred method of

contact as an alert to the complainant's *Resolve* record – see *Alerts*. (It might not always be appropriate to comply with a complainant's request.)
• Refer all media requests to the Director, Public Affairs – see section 2.2 *Dealing with the media*.
• Observe privacy and confidentiality requirements. See section 1.8 *Obligations*.
• Observe contact protocol arrangements with agencies (as set out in agency information sheets).
• Do not comment on matters about which you have no direct knowledge.
• Do not provide advice about other agencies' programs.
• Do not speak on behalf of the Ombudsman.
• Ensure you follow our Style and Presentation Guidelines when preparing correspondence and/or use the appropriate template letter provided in *Resolve*.
• Ensure all acknowledgement letters to MPs are referred through the relevant SAO to the Ombudsman for signature. All subsequent letters are referred to the relevant SAO for signature. SAOs will forward any of these letters that deal with complex or sensitive matters the Ombudsman or Deputy Ombudsman for signature.) See section 2.2 Approaches made by Members of Parliament on behalf of constituents.
• Ensure you obtain the appropriate signature (for example, SAO) for letters to agencies.
• Ensure you escalate sensitive letters (for example, using an unusual reason for deciding not to investigate further) for SAO involvement and signature.
• If writing to a complainant at their workplace or in a place of detention, ensure you observe the special arrangements.
• If leaving a message for a complainant, take care not to disclose you are calling from the Ombudsman's office so their contact with our office is kept private.

Contact arrangements with agencies

We have contact protocol arrangements with most agencies. These arrangements are outlined in the relevant agency information sheet. Where no contact arrangements are in place, the IO should contact the relevant agency specialist. In the absence of established contact protocols, the relevant Senior Assistant Ombudsman should contact the principal officer, usually the agency head. At this point, the SAO may wish to flag with the agency head the possibility of putting in place contact arrangements at an operational level. Once the arrangements are established (including confirming continuation of the agency head as the contact point), the agency specialist should record the details on the Agency Information page on the intranet.

Our contact arrangement with agencies for investigating PIDs and PID complaints are often different from our usual contact arrangements. Where an IO receives a PID complaint or PID investigation and needs to contact an agency the PID team should be contacted in the first instance. The PID team will inform the IO of the appropriate contact arrangements. In the absence of established contact arrangements, the PID team, with the relevant SAO, will establish new contact protocols with agencies for the purposes of investigating PID complaints and PID investigations.

Note: If in any doubt, check with the relevant agency specialist.

Giving advice to complainants

This office is regarded as a source of authoritative advice. As a result anything we say may be considered the definitive word on a particular issue. With this in mind you should not:

- comment on matters you have no direct knowledge about
- provide advice about other agencies' programs (for example, on eligibility for benefits or other assistance).

Similarly, it is not appropriate to comment on a person's prospects of success before a court or tribunal. Comments on the merits of a case are appropriate only when advising complainants of our conclusions in relation to their approaches, and we should confine ourselves to matters directly relevant to the performance of our functions under the Ombudsman Act.

It is also inappropriate to provide views or advice to complainants or others that is inconsistent with the office's official view.

While it is quite proper for an officer to provide an assessment of the approach, if it is to be referred to a more senior level for approval, this should be made clear to the complainant.

Speaking as the Ombudsman

During investigations, officers should **not** commit the Ombudsman to a particular view unless there are instructions or policy guidelines relating to the matter, or the viewpoint has been specifically outlined by the Ombudsman, Deputy Ombudsman or Senior Assistant Ombudsman.

You should always consider the potential consequences of what you do and say, and never:

- commit the Ombudsman to a course of action
- prejudge a case or express personal views about the merits of an investigation.

Letters to agencies and complainants

Our Style and Presentation Guidelines set out the basic parameters for consistent style and presentation of documents within the Ombudsman's office. A number of template letters are available in *Resolve* and on the intranet.

When deciding who should sign correspondence, you should take into account the level of the approach (see section 2.2 Five category complaint handling structure) the title of the addressee (e.g. MP, Secretary), the identity of the complainant, whether there is the potential for media interest, and any other potentially sensitive or significant factors.

The Quick Checklist Who should sign sets out the appropriate signatory for different types of letters.

Signature blocks for external correspondence for the Ombudsman and Deputy Ombudsmen are:

Colin Neave Ombudsman	Richard Glenn Deputy Ombudsman

Cases involving substantial legal issues are to be referred to the Legal Team for checking before sending.

Any cases involving requests that our Office pay financial compensation **must** be referred to the Legal Team.

Special handling

Special handling is required in the delivery of some letters to members of the public to ensure their privacy is protected.

Letters to complainants at their workplace

If you are required to send correspondence to a complainant's workplace, mark the envelope 'personal' or 'confidential'.

Letters to detainees and inmates

Correspondence from this office to detainees at Immigration Detention Facilities and inmates at State or Territory Correctional Facilities (or people in similar circumstances) is classed as 'privileged mail' and is provided to the detainee/inmate unopened.

The envelope addressed to the detainee/inmate must be sealed and sent in another envelope addressed to the Manager/Governor of the Facility, together with a covering letter. This covering letter is available in *Resolve* when the agency selected is DIBP or the sensitivity field on the initial approach screen is set to 'correctional facility'.

The covering letter requests the Manager/Governor to arrange for the sealed envelope to be provided to the detainee/inmate along with an acknowledgement slip, which forms part of the covering letter. The detainee/inmate signs the slip to acknowledge they received the letter unopened. The slip is then returned to our office in the self-addressed envelope provided.

The table below sets out the items you need to provide to the Records Management Unit (RMU) when sending a letter to a detainee/inmate.

Quick Checklist: Letters to detainees/inmates

Letters to immigration detainees/inmates
Investigation officer to provide to RMU:
• 1 x business size envelope sealed and addressed to the detainee/inmate enclosing letter to detainee/inmate • 1 x letter to the Manager/Governor of the Facility requesting acknowledgement that the letter has been passed to the detainee/inmate unopened • 1 x self-addressed business size envelope for return of signed acknowledgement slip • 1 x A5 envelope addressed to the Manager/Governor of the Facility where the detainee/inmate is being held (do not seal)
On receipt RMU will:
• place security seals on the envelope addressed to the detainee/inmate • place a postage stamp on the self-addressed envelope

- enter the detainee/inmate's details in a register
- place the envelopes and letter in the A5 envelope then seal for posting.

Who should sign

Quick Checklist: Who should sign

Type of letter	Who should sign
Letters to agency raising significant issues or where we proposed to make a criticism of the agency (including criticism in an issues paper or formal report)	Ombudsman, Deputy Ombudsman or SAO
Letters to agency where we propose to make a criticism of the agency or provide comment	Ombudsman, Deputy Ombudsman, SAO, Director
Letters to agency heads for Category 4 and 5 approaches, or any approach where the agency head is being asked to consider a matter personally or to personally ensure that a particular action is taken	Ombudsman or Deputy Ombudsman unless there is an established protocol between our office and an agency that anticipates this type of correspondence being signed by a lower level officer
Notices informing the Minister of the start of an own motion investigation	Ombudsman or Deputy Ombudsman
Notices informing the Minister of the use of coercive powers	Ombudsman or Deputy Ombudsman
Letters to Members of Parliament that acknowledge receipt of an approach *	Ombudsman
Letters to Members of Parliament that are in response to issues that are deemed to be serious or sensitive in nature *	Ombudsman or Deputy Ombudsman
Letters to Members of Parliament in response to issues that are deemed not to be serious or sensitive in nature*	Director or SAO
Letters to complainants containing conclusions that the complainant is unlikely to accept unless signed by a higher authority (in doing so, consider impact on possible review process)	Refer to your manager to decide the appropriate person to sign
Letters explaining that we have decided not to investigate an approach where the reasons are unusual; for example where no useful or viable remedy is available	Refer to your manager to decide the appropriate person to sign

*A letter to a member of staff working to a Member of Parliament is treated in the same way as a letter to a Member of Parliament.

Language

The work of the Ombudsman's office is judged by the style and tone of the letters we write. It is therefore essential that our oral and written communications are clear, concise and accurate.

We convey a message not just by the text of a letter but by the way it is written and expressed. It is important that the message we convey to agencies and complainants reflects the values of the office, such as independence, impartiality and professionalism.

Letters should convey that we maintain a sense of balance and an open mind until all the facts are known. Detachment and objectivity are an essential part of our method. It should be clear from our correspondence that we are discharging a role different from that of the agencies about which complaints are received from members of the public. Email correspondence with agencies and complainants is often more informal, but should not be too informal or personal.

We should demonstrate our commitment to taking a balanced approach by exercising restraint in our use of language intensifiers. Adjectives and adverbs should only be used to intensify other words when it is necessary to do so, and the added effect can be explained and justified.

The following intensifiers should be avoided in official communications, as illustrated below:

- *Extremely* important.
- *Very* marked decline.
- *Entirely* unaware.
- Further *comprehensive* discussion.
- *Significant* consequences.
- *Very* complex nature.
- Need to be *particularly* careful.
- *Quite* protracted.
- *Completely* understand.
- *Totally* agree.

All communications by our office should be consistent with our Style and Presentation Guidelines and the Australian Government Style Manual, 6th edition.

Key tips from the Style and Presentation Guidelines regarding expression include:

- use plain English
- avoid jargon and unexplained abbreviations or acronyms
- be precise
- vary sentence length
- use verbs (for example, 'explain' rather than 'provide an explanation'; 'apply' rather than 'make an application')
- use simple sentences and avoid double negatives (for example, avoid 'not unlikely'). However, an exception is made where we use the expression 'the agency was not unreasonable' rather than endorsing the agency action by stating 'the agency action was reasonable'
- use active voice rather than passive: 'we have decided' instead of 'the decision has been made to.'
- be consistent in tense

- use singular in preference to plural: for example, 'the policy states that any warrant issued.' instead of 'the policy states that any warrants issued.'

Note also that the Ombudsman prefers the use of the following terms in documentation:

- 'The Ombudsman's office'
- 'The office'
- 'We' or 'our'
- 'We investigated'

Telephone protocols

Voicemail

It is essential that all staff activate voicemail on their telephone extension and forwards all calls to voicemail when not available. (See the Voicemail – Quick setup guide for more information on setting up and managing voicemail.)

The following greeting contains the basic details you should include in your standard/external voicemail message:

> *'You've contacted [Your First name/Last name] in the Commonwealth Ombudsman's Office. I'm not available to take your call right now. Please leave your name, phone number and a brief message and I will return your call as soon as possible. Thank you.'*

During planned absences from the office of several days duration, staff should activate a separate 'out of office' voicemail greeting. The 'out of office' voicemail greeting should advise callers of the date of your departure, the date of your return and an alternative contact during your absence, should the matter be urgent. It is the responsibility of each team to manage the alternative contact arrangements for their team, through their manager.

Type of message to leave when returning a complainant's call

When returning a telephone call from a complainant, it is important to protect the complainant's privacy. Some complainants may not wish anyone to know they are making a complaint, particularly if they are a whistle-blower. The following message script can be used, as appropriate, to leave a message without identifying that you are calling from the Commonwealth Ombudsman's office:

'Hello. This is [Your First name]. I'm returning a call that was made [today, yesterday etc.] from [Caller's Name]. I would appreciate it if they could return my call on [phone number] during business hours. Thank you.'

Voicemail 'Call back' attempts

Sometimes a complainant does not respond after we call and leave a message on their voicemail or answering machine. In this instance, it can be difficult to know how long to keep trying to make contact with the complainant and how many messages to leave.

In order to meet our service delivery obligations while managing office resources, the PCT has adopted a policy of limiting call back attempts to one occasion where a message can be left on a voicemail facility or answering machine. The actioning officer will make a record of this contact attempt. If the complainant does not respond to the voicemail message, the PCT will not make further attempts to contact the complainant and, if relevant, will close the approach in *Resolve*.

Where the complainant does not have voicemail facilities or an answering machine, the PCT will attempt to call the complainant back three times over the next two working days. These attempts will be made at different times of the day to offer the best chance of contacting the complainant. If the call is still not answered during this time, the approach is closed in *Resolve* with details entered regarding when the call back attempts were made.

This also applies where the complainant has indicated a specific time for the PCT to return their call, but is then unavailable when at that time. In this case the PCT will make two further attempts to return the call during the next two working days. If there is still no answer, the approach will be closed in *Resolve* with details entered regarding when the call back attempts were made.

Call attempts for written complaints

Where PCT receives a written complaint (email, fax, online complaint, post) and a telephone number has been provided by a complainant, the actioning officer should give preference to responding in the first instance via telephone (unless a complainant specifically requests a response in writing, or special circumstances apply).

The PCT has adopted a policy of limiting call attempts for written complaints to three calls over two working days. As with the policy of returning voice mails, these calls should be made at different times over this two day period. A voice message requesting a call-back can be left by the actioning officer for one or all of these call attempts.

Should a complainant not be contactable via telephone after three call attempts, the actioning officer should send a written or email response to the complainant notifying of a decision, a request for further information or a request for a call-back. Where further information or further contact from a complainant is requested, a time-frame should be provided. In the case of email correspondence, that timeframe could range from 3 days to 7 days depending on the nature of the matter. For written correspondence, a timeframe of 7 to 14 days would be appropriate.

While these procedures have been approved for use by the PCT, they also provide a general guide for IOs, to be applied as appropriate. If an IO is unable to contact a complainant by telephone, they should write to the complainant instead, where the IO has the complainant's postal address.

Recording telephone conversations

From time to time callers have informed Ombudsman staff that they are recording or intend to record their telephone conversation. On other occasions it appears clear that the caller is recording the conversation.

Recording a telephone conversation without consent may be against the law in some states. And recording or monitoring a call without all parties to the call may be an offence under the *Telecommunications (Interception and Access) Act 1979*. A recorded conversation can expose the office to long and ultimately fruitless debate on inconsistencies between an IO’s notes and the complainant’s recording. Further difficulties may arise if the recording is selectively quoted by the complainant or the recording is incomplete or of poor quality.

The office policy is to refuse to have telephone conversations recorded. If asked, you should inform the complainant that it is office policy not to agree to have telephone conversations recorded.

If a complainant continues to insist on recording the conversation you should inform the caller that you are terminating the call and that any future communication on the matter should be in writing.

Exceptions to the policy

If a complainant informs you that they have a disability, literacy problems or another legitimate impediment that limits their capacity to retain and comprehend information or take notes, you should consider whether the conversation should be recorded.

Decisions to allow conversations to be recorded should only be made after consultation with your supervisor. You should consider issues such as:

- the complexity of the subject matter
- whether the person is unable to take appropriate notes
- whether it would be better to communicate with the complainant in another way such as writing
- whether we should also make a recording, with the other party being made aware of this.

There is an expectation that IOs will keep detailed and accurate notes of all telephone conversations.

Remember to include important details such as the time, or where messages were left, with whom and on which phone number they were left, and the precise content of messages or comments that were made.

Email protocols

It is important to use professional language in all email correspondence and to avoid any perceptions of bias or conflict of interest.

Given our email and fax form part of our professional badging, it is important to ensure these communication channels are used appropriately. We must be careful to avoid any accusation that we have used the 'influence of our office' in personal communications to 'encourage' an agency to a favourable outcome.

In official communications, take care to avoid using overly familiar greetings to agency contacts or complainants, such as 'hi' or 'hello', asking personal questions, such as 'how was your weekend' before turning to the business matter at hand, or signing off with 'warm regards', 'cheers', or similar. Such terms can create a perception of bias, even if unfounded. While email can be a less formal means of communication, it is important that all our email communication is seen to be impartial by recipients and third parties alike.

It is preferable to make use of group emails rather than from your individual email account:

- it means that investigation officers do not have to disclose their personal email addresses when corresponding with a complainant.
- it avoids situations where emails are left un-actioned when IOs take leave for extended periods, or stop working with the Ombudsman’s office.
- the group email address may also be useful to provide as a contact when an investigation officer is about to take time off or leave the office.

Appropriate openers

<First name>
Dear <first name>
Dear <title><last name>
<Nothing>

Appropriate closures

Thanks [followed by your first and/or last name]
Regards [followed by your first and/or last name]
Yours sincerely [followed by both your first and last name]
Yours faithfully [followed by both your first and last name]
<Nothing> [other than your first and/or last name]

Subject line in emails to departmental contacts

The subject line, when pursuing a complaint with an agency, should consist of 'Your ref: xyz; Our ref: 2014-******'. Add the name of the case only if the agency is on Fedlink. Otherwise the name of the complainant/case should be in the body of the email in the first line as: '**Re: Joe Bloggs Complaint'**

Leaving the name out of the subject line for non-Fedlink agencies increases security slightly. If the other agency's reference includes the name then that also should appear in the subject line only for Fedlink agencies, or at the start of the body of the email in other cases.

What to do with personal content in official emails

There will be times when we know agency contacts well enough to exchange personal comments such as 'What are your plans for the weekend' or 'how did the race go last week'. These comments should be put in a separate email or better still, make a telephone call. If you receive an email combining personal and official matters you should ask your contact to resend the official email without the personal matters, so that you can put the response on file.

History trail in email

It is generally desirable to delete the previous history from an email prior to sending a response. Given that previous emails will be on file this will avoid duplication and make the file much easier to follow. Leave the history if the person at the other end may not have the history readily accessible (for example, there has been a change of case officer) or if our file does not contain the previous email trail and those emails cannot now be separately filed.

For further information on our email protocols, please refer to the Email Management Policy.

Communicating with complainants

Quick Checklist: What to bear in mind

- Try to understand the complainant's perspective—respond with empathy and a genuine interest in resolving the approach.
- Always communicate clearly and courteously—avoid jargon, unexplained abbreviations or acronyms.
- Be sensitive to special needs.
- Be aware of cultural issues.
- Be aware of strategies to manage difficult behaviour appropriately.

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- Be aware of cultural issues.
- Be aware of strategies to manage difficult behaviour appropriately.

Understanding

Members of the public who approach this office expect us to act fairly, efficiently and effectively. It is important that we respond with empathy and understanding, and that people feel we are genuinely interested in helping to resolve the problem.

Particularly with the increased emphasis on improving service delivery in the public sector, we need to provide the best possible service to the people who seek our assistance.

Try to understand the complainant's perspective. Whether they are right or wrong, people contact us because they have a problem that they cannot fix themselves, or that another government agency has been unable to explain or resolve to their satisfaction.

Some people may feel frustrated that they have been given the 'run around'. It may be that nobody has taken the time to clearly explain the reason for a decision, his or her concern was not understood, or that the remedy provided was not appropriate or did not fix the problem.

As complaint resolution specialists, we should be careful not to make these same mistakes and understand that a complainant who has not dealt with us before may have reservations about approaching us. To them, we are just another government agency.

At the same time, it is essential to remember that we do not 'represent' or advocate on behalf of complainants in the same way as a solicitor, for example. The Ombudsman's office is independent and impartial in dealing with both agencies and complainants. Our job is to provide a balanced view and determine whether a remedy can be provided to the complainant, if appropriate.

Special needs

All people in Australia are entitled to access to the services provided by our office. We need to be mindful that some groups may have special communication needs, including people with disabilities and people affected by mental illness.

You may wish to use the following services and products to assist you to communicate with complainants with special needs:

- the National Relay Service can help you communicate by telephone with people who have a hearing or speech impairment
- the font type and size on the Ombudsman's internet site can be adjusted to accommodate use by people with diminished sight

Every effort should be made to communicate directly with the complainant using the assistance available, However, if a complainant expresses any concern about difficulty communicating with us as a result of their special needs, staff should explain that it is also possible to make a complaint via (or in tandem with) another person or organisation.

A complainant with special needs might also request that our office communicate with them in a particular way or at a particular time. Where possible, these requests should be accommodated and recorded as an Alert.

For further information see section 2.2 Approaches made on behalf of someone else and Multiple complainants.

Talk to your manager if you need advice about how to handle a complainant's special communication needs.

Cultural issues

All people in Australia are entitled to access to the services provided by our office. We need to be mindful that some groups may have special communication needs, including people from culturally and linguistically diverse backgrounds and Indigenous Australians, who may speak multiple languages but not English.

You may wish to use the following services and products to assist you to communicate with complainants from different cultural backgrounds:

- Religious diversity guide
- Translation and interpreting services

Talk to your manager if you need advice about how to handle a complainant's special communication needs.

Religious diversity guide

The Australasian Police Multicultural Advisory Bureau has developed a practical reference guide to religious diversity. Developed in consultation with community representatives and leaders throughout Australia, the guide aims to assist in the delivery of culturally appropriate, customer-orientated services to all Australians.

While not specifically designed for Ombudsman staff, this reference guide may be useful in complaint handling processes. A Practical Reference to Religious and Spiritual Diversity for Operational Police is available online and includes sections for:

- Aboriginal and Torres Strait Islander spirituality
- Baha'i faith
- Buddhist faith
- Christian faith
- Hindu faith
- Islamic faith
- Jewish faith
- Sikh faith

Translation and interpreting services

It is important to understand the difference between translating and interpreting, as the terms are not interchangeable. Put simply, translating involves written words while interpreting involves spoken words.

The office's policy on Translation and Use of Interpreters can be found on the intranet.

All translators and interpreters should have qualifications from the National Accreditation Authority for Translators and Interpreters (NAATI) at the Translator or Interpreter level

(formerly known as Level 3). A list of languages for which accreditation is available can be found on the NAATI website.

Accreditation does not yet exist for some languages. If you need to have interpreting or translation done in one of these languages, please contact the PCT Supervisor in the first instance.

In addition to our standard requirements for confidentiality and privacy, all translators and interpreters must abide by the Code of Ethics issued by the Australian Institute of Interpreters and Translators Inc. (AUSIT). The code covers professional conduct, confidentiality, competence, impartiality, accuracy, employment, professional development and professional solidarity.

Interpreters

Some people may need to use an interpreter to communicate effectively with staff in our office, either by telephone or face-to-face. Some people may be able to converse in English but require an interpreter to understand complex information of a technical or legal nature. Others may require an interpreter during stressful situations when their command of English decreases temporarily.

When to use an interpreter

An interpreter should be provided when a complainant requests one or where the person's details on *Resolve* indicate that an interpreter is required. If you feel you require an interpreter to communicate effectively with a complainant, but the complainant disagrees, you should inform the complainant that you need an interpreter to continue the conversation.

An interpreter can be contacted by telephone 'on-the-spot' for most high demand languages, or booked in advance. Less common languages or languages where most members of that group are relatively recent arrivals to Australia (where fewer interpreters are available) will generally require an advance booking. Face-to-face on-site interpreting can also be arranged with advance notice.

As a rule we use the Translating and Interpreting Service (TIS) for all telephone interpreter requirements.

DOs and DON'Ts

- If a person objects to an interpreter on the grounds of politics, class, race or religion, arrange another interpreter who is acceptable to the complainant.
- If the matters being discussed are sensitive, personal or medical it is best to arrange an interpreter of the same gender.
- A person has the right to ask for a different interpreter if they cannot understand them, for example if they speak a different dialect of the required language.

- Do NOT use a friend, relative or child (under 18 years) to interpret on behalf of the complainant. The complainant may not wish to disclose personal information through a friend or relative. Additionally, while this person may 'speak the same language', they may:
    - lack the specialist terminology required to accurately interpret what is being said
    - be too emotionally involved to interpret impartially
    - change the complainant's message to you
    - block out parts of your message to the complainant

This does not mean that a friend or family member cannot act on behalf of a complainant, just that they should not be used to interpret between the complainant and the IO.

It is especially important not to use a child (under 18 years) to interpret because:

- they will almost certainly not have the required interpreting skills
- the use of a child can distort the power and authority relationships within the family
- a child should not be put in the position of having to take responsibility for the outcome if a mistake is made
- the child may be exposed to information that is not appropriate for their age
- the parent may not disclose all necessary information because they are trying not to expose the child to information that is not appropriate for their age.

How to use an interpreter

A guide to using interpreters can be found on the intranet.

The office regularly holds training sessions on how to use interpreters. It is recommended all staff attend. Contact Human Resources for details of upcoming training.

Staff may also find it useful to consult *Working with TIS National Interpreters* on the DIBP website.

Recordkeeping

You should record any special interpreter requirements in an alert against the complainant's record in *Resolve,* to ensure these needs are taken into account in any future communication by our office.

The record should include the language and dialect required and any other requirements, for example, whether the complainant needs an interpreter of a particular gender.

Translations

For some people to understand us or to make a complaint to us, they may need to write to our office or receive a response from our office in a language other than English. This applies not only to complaints. In some instances, where our target audience has a large proportion of people who are likely to not speak and/or read English, translated documents or advertising material may be needed. Examples of this include Ombudsman posters distributed in Immigration Detention Facilities and to private education providers who teach overseas students.

For guidance on using translating services, see the office's Translation and Use of Interpreters Policy.

Managing unreasonable complainant conduct

Dealing with difficult behaviours: key principles

- Every person has the right to approach us.
- We treat every approach impartially and professionally.
- We don't presume that a complainant who has exhibited unreasonable complainant conduct is not raising a legitimate issue.
- The nature or the method of a complainant's approach should not influence our consideration of the issues they raise.
- Our actions must always be open and accountable.

Note: Threats of self-harm or harm against property or persons fall into a more serious category of behaviour. To deal with threatening behaviour, please see our separate guidelines – Callers at risk of harming self or others and Critical incident procedures and reporting.

By its nature, our work requires us to deal with instances of unreasonable complainant conduct.
Unreasonable complainant conduct may be exhibited by complainants who:

- make persistent and excessive contact
- demand that their matters be resolved immediately, even if this adversely affects others
- demonstrate a lack of cooperation
- present unreasonable arguments
- are insulting, rude, aggressive or threatening.

Unreasonable complainant conduct can include verbal or physical abuse, persistent and frequent contact and behaviour arising from the symptoms of mental illness. While the number of approaches of this nature is comparatively small, if not managed effectively, they can occupy a disproportionate amount of office resources.

Reasons for unreasonable complainant conduct can include:

- frustration or anger in response to a decision by the agency or this office
- reluctance to accept any outcome that does not amount to complete vindication
- reluctance to 'let go' of the complaint, even after it has been resolved to the satisfaction of the Ombudsman.

It is important to manage unreasonable complainant conduct appropriately. You should be aware that:

- you will probably have to deal with such behaviour from time to time
- potential future problems can sometimes be reduced by careful handling at the outset
- complainants who demand special or priority treatment will only receive it if the circumstances warrant that treatment
- it is not part of your duties to be insulted or threatened
- you have the support of the office and access to internal or external counselling if needed
- you should consult your manager about behaviour you find difficult to deal with.

All members of the public have the right to approach the Ombudsman and to have their approach considered objectively, impartially and professionally. However, the Ombudsman does not expect staff to tolerate abuse or aggression, or to fear for their personal safety while carrying out their duties.

People who continue to contact this office after the finalising of their approach should be dealt with through the review and/or service delivery complaints processes – see *Chapter 4—Complaints about us*. If people continue to exhibit inappropriate behaviour when dealing with us, we may decide not to consider their approach. This should be discussed with your manager.

Details about complainants who have special needs and/or special contact arrangements should be recorded in *Resolve*.

Alerts

An 'alert' is a short text box which can be prompted to display when a complainant's record (including associated approaches) is accessed. Alerts can be used to quickly convey any relevant information to help staff effectively manage their interaction with a complainant.

An alert may include details such as:

- a complainant's preferred method or time of contact
- a complainant's language, cultural or special assistance requirements in communicating with our office
- the office's internal management arrangements for a complainant (such as a single point of contact, a write-only arrangement, or a decision that a particular topic will not be further investigated or discussed).

It is important to ensure that information contained in alerts is clear, concise, factual and relevant to our work. It should not include assumptions, judgements, or derogatory terms. It is important to remember that, like the rest of a complainant's record, information contained in an alert may be released to a complainant if requested.

Examples of appropriate alerts might include:

'Mr Smith has asked that we do not telephone him in the morning. Please call after 12pm.'

'Mrs Jones has hearing difficulties. If it is necessary to telephone her, she has asked that you please do so through the National Relay Service.'

'Ms Prince has complained to our office about Centrelink's handling of her 2009 compensation claim on a number of occasions. That matter has been investigated and finalised, and the Deputy Ombudsman has advised her that we will not investigate or respond to any further contacts on this topic. All new complaints on unrelated topics should be allocated to Jane Thomas in the ABC Team.'

An example of what is not appropriate is to merely repeat what an agency may have said about a complainant, for example:

'Agency X has advised that Mr Bloggs has exhibited mental health issues'.

If staff believe that an alert should be placed on a complainant's record they should first seek the agreement of their manager and SAO. Proposed text should then be sent to the Director, Operations South, who will arrange for the alert to be added to the complainant's *Resolve* record.

An alert will also be placed on a complainant's *Resolve* record following the completion of a review where the outcome is to affirm the original decision of the IO. The aim of the alert is to prevent reinvestigation of the same complaint in the absence of new information.

Identifying unreasonable complainant conduct

People may exhibit unreasonable complainant conduct by being hard to negotiate with, verbally or physically aggressive, unreasonably demanding, excessively persistent, or unwilling to accept reasonable outcomes.

While staff are not qualified to 'diagnose' or counsel members of the public, the following groupings of behaviour can be helpful when determining what strategies to employ when attempting to resolve an approach.

You should use the 'alert' function within *Resolve* to indicate if a person has been particularly difficult to deal with, or if there are special contact arrangements in place.

Abusive

Includes angry, offensive, aggressive and potentially violent behaviour. Any complainant, regardless of initial presentation, can engage in abusive behaviour.

Indicators can include intrusive, over-talkative, loud behaviour and people affected by drugs or alcohol. Violence can arise in graduated behaviour from irritation, growing anger and threat of violence, to throwing furniture or similar.

Complainants may have legitimate reasons to be angry: often their interaction with an agency has given good cause. However, that anger can go beyond acceptable limits and become abusive behaviour targeted at our officers. Abuse can include critical remarks about the officer, strident or vulgar language, racist, sexist or obscene criticisms of third parties, and offensive gestures, words or noises.

Excessively persistent

Can include persistent contact and an obsessive style. This type of complainant tends to seek vindication, 'justice' or is not able to 'let go'. They may make numerous telephone calls, seek personal interviews, or initiate a continuous exchange of correspondence. They may want to deal with only the most senior officer available or the Ombudsman personally.

Mentally ill

Manifestations of mental illness can include heightened levels of arousal, which may lead to displays of aggression, irrationality or feelings of being controlled by external forces. People suffering mental illness may exhibit obsessive-compulsive behaviour or paranoia (e.g. believing they are the target of conspiracies or surveillance by ASIO).

Written material submitted to support an approach might be of significant length and volume. The formatting of submitted letters may include frequent underlining, and the emboldening or highlighting of some words or passages. In discussion, the person may display an inability to remain focused on the subject under discussion, movement from innocuous facts to distant and unwarranted conclusions, fixations on hidden meanings behind apparently routine administrative actions, and assertions of agency behaviour divorced from reality (e.g. being followed by ATO officers, or having telephones tapped by Centrelink).

Strategies for managing unreasonable complainant conduct

The following strategies can be useful when managing unreasonable complainant conduct. Staff may also consult the Ombudsman's *Better practice guide to managing unreasonable complainant conduct,* and should be mindful of the office's Security policy and the policies for Callers at risk of harming self or others and Critical incident procedures and reporting.

Managing expectations

Complainants often approach this office with unrealistic expectations of our powers and the remedies we may be able to achieve for them. It is important to manage these expectations from the outset by communicating clearly and transparently. Explain exactly what we can and cannot do, including our processes, average processing times, the limits of our role, likely timeframes for contact and resolution, and possible remedies (if any), where appropriate.

A nominated contact point

A nominated contact point is particularly important when managing unreasonable complainant conduct. It allows us to maintain and reinforce the one-to-one relationship between the complainant and the nominated contact officer, who often develops knowledge

of the complainant's history and strategies for dealing with his or her behaviour. A nominated contact person also prevents complainants ‘shopping around’ for a different outcome to their approach.

To assist the PCT and other staff in managing and transferring calls from people who have exhibited unreasonable complainant conduct, the 'alert' function within *Resolve* should be used to indicate the relevant contact person, any special contact arrangements or other relevant information.

Maintaining focus

Listening to what the complainant has to say is an important part of our work. It helps us collect information and reassures the complainant that we are taking their approach seriously.

However, it is not the role of this office to provide a counselling service, and time spent with individuals needs to be managed in the context of the office workload as a whole.

In the case of complainants with unreasonable complainant conduct, it is good practice to identify the key issues the office is able to address at an early stage and relate them back to the complainant, preferably in writing. This can then be revisited at any point, to re-establish the scope and focus of our investigations. It also reinforces the message that the office decides how the complaint will be dealt with, not the complainant.

Control of the complaint-handling process

It is important to retain control of the handling of a complaint, even if confronted with unreasonable complainant conduct, such as a person demanding daily updates or 'urgent' action on their approach.

Distance, objectivity and professionalism in dealing with complainants are essential to effectively managing approaches. This can be difficult when dealing with abuse or loaded comments. Comments that are irrelevant to the issues being considered should be ignored and the conversation returned to the focus of the complainant's approach.

Your manager (as well as other officers) is available to provide advice or support when dealing with unreasonable complainant conduct. It may also be appropriate to escalate the approach.

Escalating the approach

Escalating a call is an option for a complainant, public contact officer, or investigation officer.

If you no longer feel comfortable handling an approach because of unreasonable complainant conduct, you should escalate the approach to your direct supervisor.

The direct supervisor may make a decision not to continue to handle the complainant's approach, or to deal with them only in writing, because of continued inappropriate behaviour.

Complainants may also ask for their approach to be escalated to someone more senior. A complainant has the right to request to speak to an officer's direct supervisor. This is, however, a 'once-only' process.

If a complainant wants to escalate the call, try to clarify with the person if the issue is a breakdown in communication, for example, either party not understanding the other. If yes, then escalation is appropriate (as opposed to a service delivery complaint recorded as an

OMB approach). The aim of passing the call to the direct supervisor is to de-escalate the communication by introducing a third party, without over complicating the situation.

Complainants who are dissatisfied after speaking to the direct supervisor should be asked to put in writing the reasons for their request. A more senior officer will then deal with it as a service delivery complaint or review (see Chapter 4—Complaints about us)

2.2 Approaches

The five category complaint-handling structure

An approach is a contact with the office about a new matter regarding one of our core business functions.

All such contacts with our office are described as 'approaches'—whether the approach is made in person, by phone, in writing or through a third party.

Approaches are divided into five categories to allow the office to respond to approaches based on:

- type of approach (for example, those we investigate, and those we do not investigate, such as media enquiries and publication requests)
- potential sensitivities
- degree of effort to finalise the approach.

The access of IOs to the different categories reflects current delegations. More complex and/or sensitive approaches are usually investigated by Senior Investigation Officers, although IOs at the APS 4-6 level can also undertake more complex investigation with manager/specialist approval.

Escalation through the investigation categories requires passing through checkpoints, to involve managers and specialists in decision-making. For example, escalation from category 2 to 3 requires the preparation of an investigation plan.

The table below provides more information regarding each category and the desired timeframe for finalisation in the office's complaint management system, *Resolve.*

Average Processing times

Approach	Description	Average processing time
Category 1	**Initial approach**	
	• Involves a single telephone call or in-person approach • Includes a response to a voicemail or SMS where dealt with by a return telephone call • Resolved without investigation • Outcomes include discretion not to investigate, and referrals • Limited data entry required	**3 working days**

Category 2	**Further assessment**	
	• Involves the assessment of all approaches received via email, fax, online or in writing • Includes approaches made over the telephone or in-person which cannot be resolved in the one call and follow up actions are required. • Approaches that cannot be resolved at category 1 and require further internal inquiries, research or specialist advice, or more information from the complainant • May be transferred from the receiving officer to an operations team or officer for resolution • Resolved without contacting the agency in relation to the specific approach or complaint • An agency may be contacted to obtain publicly available or 'open-source' information without reference to the specific approach or complaint	**2 weeks**
Category 3	**Investigation**	
	• Investigation plan required to escalate from category 2 to category 3 • Resolved with one substantive contact with the agency • Record resolution/remedies • Monthly update to manager	**3 months**
Category 4	**Further investigation**	
	• Approaches that cannot be resolved at category 3 and require further investigation • Resolved with two or more substantive contacts with the agency • Sensitive or complex approaches • Record resolution/remedies • Allows for use of coercive powers (s 9) • Automated specialist and manager notification • Monthly update to manager	**6 months**
Category 5	**Formal reports**	
	• Approaches that cannot be resolved at category 4 • Use of formal reporting (s 15) • Monthly update to manager	**12 months**

Category 1 – Initial approach

The Public Contact Team handles most Category 1 approaches.

An approach is closed at Category 1 if it is resolved in the course of a single telephone conversation or in-person conversation. For our purposes, a telephone response to a voicemail or SMS would also count as a single telephone conversation, as would a conversation where the caller is placed on hold while a matter is researched or informal advice is sought. Please see ‘telephone protocols’ for our office policy on returning voicemails – this will outline the point at which written communication may be warranted and therefore an escalation to Category 2.

An in-person enquiry may occur at an office reception counter or on an outreach activity. As with other matters, if follow-up actions are required then an escalation to Category 2 may be warranted.

Discretion not to investigate (under s 6 of the Ombudsman Act) may be applied in Category 1. For example, where a complainant is advised over the telephone to first lodge an official complaint with the in-jurisdiction agency complained of, the approach will be closed at Category 1 and the outcome 'Advised to pursue elsewhere – agency complained of' will be recorded.

Category 2 – Further assessment

Category 2 approaches are approaches that cannot be resolved in a single telephone or in-person contact. All online, email, fax and written approaches are to be escalated to the Category 2 level in the first instance.

Category 2 approaches require further assessment by a member of staff before a decision can be made whether or not to commence an investigation.

Sometimes this assessment will require reference to publicly available or 'open-source' information from an agency. An agency may be contacted to obtain publicly available or 'open source' information without reference to the specific approach or complaint—for example, information on an agency's website or through a general enquiries line. If there is any doubt about the enquiry, the approach should be discussed with your manager.

Category 2 approaches will be assessed and resolved by the PCT, or allocated to another team for further assessment.

Discretion not to investigate (under s 6 of the Ombudsman Act) may be applied in Category 2, as in Category 1.

Category 3 – Investigation

Approaches requiring contact with the agency for their resolution are escalated to Category 3.

An investigation commences at the point at which we contact an agency.

An approach is automatically escalated to Category 3 when you complete an investigation plan in Resolve.

An approach can be closed at Category 3 if its resolution requires only one substantive contact with an agency.

In all cases, one substantive contact will be the s 8 notice to agency.
The concept of substantive contact is intended to exclude minor second contacts. Examples of contacts that are not substantive include:

- a contact made to correct an error or rectify an omission in the first contact with the agency
- a contact intended to seek minor clarification of a point in an agency's response or minor follow-up on the original substantive contact without the need to escalate.

When considering the content of a s 8 notice, IOs should first be aware of any known issues and information relating to the agency complained of from sources such as websites, IOIs, FAQs, the PCT Quick Guide and for the PIO, the PIO Reference Manual.

Category 4 – Further investigation

A Category 4 approach includes two or more substantive contacts with the agency being investigated.

When a satisfactory remedy cannot be achieved through straightforward communications with the agency contact officer, it may be necessary to escalate the matter for further investigation. For example, it may be necessary for a SAO to write to the head of the agency to resolve the matter, or to use formal powers to gain access to files or documentation.

If an approach includes two or more substantive contacts with the agency you should consider escalating it to Category 4. This allows officers who may have additional knowledge or authority to become involved.

Two substantive contacts would include matters such as:

- questions requiring a material response to key issues
- pursuit of late responses where escalation to a more senior officer is required.

Escalation to Category 4 is an important flag for specialists and managers. It ensures that the investigation of the approach is more closely managed through automated specialist notification and monthly updates to the IO's manager. It also provides an opportunity for IOs to receive guidance from specialists.

Factors that will usually cause a matter to be escalated to Category 4:

Reluctance by agency to acknowledge identified issues
If an agency is reluctant to acknowledge the issues we have raised with them, you should escalate the approach to Category 4. This will alert the agency specialist to the agency's view in relation to the matter and invite their involvement or advice.

Involves potentially sensitive issues
Sensitive cases could include those involving MPs or the media. Escalating to Category 4 will ensure that your supervisor and relevant agency specialists and SAOs are aware of the matter. Escalate these approaches at the earliest opportunity: it does not matter if the potentially sensitive issues do not eventually transpire.

Involves the head of the agency
Our contact protocols with some agencies require us to contact the head of the agency in relation to approaches we receive. Correspondence with the agency head in these circumstances is signed by the SAO and is not normally escalated to Category 4.
Where we do not normally contact the agency head in relation to approaches, if you believe it is necessary to bring a particular approach to his or her attention you should consider escalating the approach to Category 4.

Involves improper behaviour of officials or other possible disciplinary matters
Serious misconduct may only be brought to the attention of the head of the agency by the Ombudsman or Deputy Ombudsman. If our investigation has revealed evidence of serious misconduct, the approach should be escalated to Category 4 at the earliest opportunity. This ensures that all relevant Ombudsman staff are aware of the allegations and can offer guidance for the management of the approach.

Requires use of formal powers
All approaches where the use of formal powers has been approved (for example, s 9 request to obtain documents or conduct an interview) should be escalated to at least Category 4 (For further information see section 3.4 Coercive powers.

Compensation may be appropriate
Escalate where we are suggesting that an agency should consider payment of compensation in relation to an approach. This will ensure that the agency specialist is aware of the IO's suggestion.

If a complainant seeks compensation from the Ombudsman, this must be referred to the Legal Team to handle.

Involves complex legal or legislative issues
Escalate if the investigation involves complex legal or legislative issues and refer the matter to the Legal Team for advice. The Legal Team may offer internal legal advice or may seek external advice on the issue.

Further correspondence with the agency requires a SAO or Ombudsman signature
There are a number of reasons why you may decide it is necessary to have a more senior officer sign correspondence to the agency. These approaches should be escalated to Category 4.

Office policy requiring the approach to be escalated
Sometimes agency specialists require particular categories of approaches to be escalated to Category 4 for monitoring purposes. Details of those approach categories are contained in the agency information sheets on the intranet.

Unable to resolve the approach within 60 days
If the approach has taken longer than 60 days to resolve, this may indicate that there is a lack of responsiveness by the agency, or that the issues involved are potentially complex or sensitive. If it appears that this may be the case, then you should escalate the approach to Category 4.

If the approach is straightforward and likely to be resolved within a short period after the 60 days have elapsed, you may decide that it should remain a Category 3 approach.

Category 5 – Formal reports and major investigations

Where our office identifies areas requiring action by the agency, whether in an individual case or more generally, it may highlight these in a number of ways including:

- issues of interest log
- case meetings
- providing comments under s 12(4) of the Ombudsman Act.

If the agency responds positively and accepts our findings and suggested remedial actions, then the complainant and the agency should be informed of the outcome and the investigation finalised.

However, if the agency does not agree to all of our suggestions, then a decision will have to be made as to what further action, if any, is appropriate.

If the matter is significant and an appropriate outcome cannot be negotiated with the agency, the matter may warrant a report being prepared and issued under s 15 of the Ombudsman

Act. The action requires presentation to the Strategic Policy Board for approval. If approved, the matter should be escalated to Category 5.

Types of complainant

It is important to record the complainant's name, phone number and address in *Resolve* as you take the approach. This allows us to contact the person again and provides useful information about the origin of approaches. The exceptions are where the person prefers to remain anonymous, or wishes to use a pseudonym, or if they are on the National Witness Protection Program (in which case their name, if known, must not be recorded). As you record their details, you should check if the person has approached the office previously, or if there is anything else you should know about them (for example, an alert notification indicating that only the team or office manager should deal with the individual).

It is also important that the complainant's contact details are kept up to date in *Resolve*. Each time we contact the complainant we should confirm the complainant's current preferred postal address and preferred means of contact. The preferred means of contact should be added as an alert to the complainant's record in *Resolve*.

Quick Checklist: What information do you need?

What information do you need?

- Person's details? (name, phone number, address, complainant reference numbers).
- Has the person contacted us before?
- Is there anything I should know about the person? (e.g. alerts, sensitivity)
- What type of approach is it? (e.g. information request, service delivery approach or complaint).
- Is it an existing or a new approach?
- Is the agency in jurisdiction?
- What is the issue?
- If out of jurisdiction (OOJ), is there somewhere to refer them?
- Have they been to the agency?
- What remedy are they seeking?

Anonymous approaches

Sometimes complainants do not wish to reveal their identity when making an approach. The Privacy Act – see APP2 requires that individuals be given the option of not identifying themselves or using a pseudonym unless it is impracticable to do so, or the law otherwise requires them to be identified.

There are generally two types of anonymous approaches:

- when the complainant wishes to have their identity kept from the agency concerned, but is willing to provide their personal details to the Ombudsman
- when the complainant is not willing to reveal their identify or provide their personal details to the Ombudsman.

Our obligation under the Ombudsman Act to consider, and where appropriate investigate, approaches also applies to anonymous approaches. Where a complainant does not want their identity made known to the agency complained about, meet their wishes wherever possible. However, it is often difficult to investigate and achieve a resolution with limited

information or where the complainant has placed limitations on the information we can provide to the agency.

It can also be difficult to comply with the Ombudsman Act in all respects when dealing with anonymous approaches. For example, s 12 requires that the complainant be informed of the results of the investigation. However, it may be possible to make arrangements to inform the complainant of the outcome of a complaint (for example, by organising for the person to telephone at a pre-arranged time, forwarding an outcome to an agreed intermediary or mailing a letter to an agreed address).

When we know the identity of a complainant who wishes to remain anonymous, we usually treat the case in the same way as an anonymous approach. This helps maintain public confidence in the role of the Ombudsman. It is also relevant if the complainant is an employee or contractor of the agency.

Note: **Disclosers**—current or former government employees or contractors who wish to report a disclosable conduct under the PID Act can approach our office anonymously. It is important that the case is marked 'PID' under the 'sensitivity' field in Resolve so that the PID Team is made aware of the PIDs to this office.

Tip offs

A tip off is a disclosure made to an agency, usually containing confidential or inside information. They are commonly made to agencies such as DHS, the ATO and DIBP, and usually aim to call into question another person's entitlement to a government payment, service or other benefit. They may also relate to allegations of inappropriate action or behaviour by a member of staff of an APS agency or contracted provider.

A tip off may be anonymous. If so, refer to the relevant parts of the WPM on how to manage these approaches.

Before acting on a tip off, IOs should consider if the complaint is in jurisdiction or if the information or allegations are better dealt with by another agency. In some cases it may be more appropriate to pass the information to law enforcement authorities.

Before forming an opinion that a tip off should be investigated, it is important to gather as much information about the allegations as possible to support the claims. A general, non-specific allegation not supported by credible information is difficult to investigate and may well be baseless. Conducting an investigation into such a claim is potentially embarrassing for the office.

You should attempt to collect supporting information such as:

- information about a specific incident
- dates and names of individuals involved
- any attempts the complainant has made to report the matter to other agencies and the outcome of those attempts.

We often receive complaints about agencies that have received tip offs that seemingly have not been acted on. In these circumstances it may be appropriate to conduct an investigation to ascertain if the agency received the tip-off and then dealt with it appropriately.

The only information that can be revealed to the complainant in these circumstances is our decision as to whether the agency concerned has dealt with the tip off appropriately. An agency's finding as a result of the tip-off is not to be conveyed to the complainant.

Approaches made on behalf of someone else

People sometimes approach us on behalf of (OBO) someone else (for example, Mrs Black on behalf of her husband, Mr Black). Even if the person approaching the office is closely related to the complainant, you must get the complainant's permission before proceeding, to be sure they have consented to the person approaching our office on their behalf.

If a person wishes to remain anonymous, then an OBO is not the appropriate means to do this. Instead they should be advised that they can remain anonymous, subject to the limitations that might apply.

In some circumstances a person may have legally formalised authority to act on behalf of another person, such as a power of attorney, guardianship order or executorship. In those circumstances it may be necessary to obtain a copy of the formal document that evidences this arrangement. In some circumstances the person on whose behalf they are acting may be unable to give consent.

Where the person approaching the office is a solicitor, tax or migration agent, you should normally accept an assertion that he or she is acting on behalf of a named client (for example, a reference to a person as a client of that professional or a claim to have been engaged or instructed by that person for this purpose). Professional and regulatory bodies would take a strong and adverse view of a professional who purported to act on behalf of a person who was not a client, especially in dealings with a government agency. If the words are ambiguous or if you are in any doubt (for example, if the professional simply refers to a dispute involving a named person, or you have doubts that the person is a member of the profession they claim to be), you should seek express confirmation that the person is a client. If you become aware that, despite the assertion, the professional is not, in fact, representing the person, you should inform your manager so that consideration can be given to informing the relevant professional or regulatory agency of this probable misconduct.

Whether the permission is obtained in writing or verbally will depend on the circumstances of the complaint. There is no requirement under either the Ombudsman Act or the Privacy Act to obtain written permission

However, PCOs and IOs must be wary of others seeking to obtain information about another person. For example, a person who states that they are Ms X may wish you to confirm what address this office holds for them. IOs MUST NOT provide that address.

What to do

The following procedures are aimed at ensuring that we do not put complainants, or ourselves, to unnecessary effort. In particular, there is no point in a PCO seeking a written authority to act if we are going to decline to investigate (s 6) the complaint.

PCOs:

For complaints made by telephone:

- PCOs should advise the caller that as they are making a complaint on someone else's behalf, the consent of that person might be sought at a later stage.

For complaints made in writing:

- Where a PCO is processing a written complaint, if the documents include a written authorisation from a person for another person to act on their behalf, this should be noted in Resolve.

IOs

If an IO decides that:

- obtaining verbal permission is appropriate, make contact by phone and ask to speak to the complainant with a view to ensuring that the complainant has given permission for another party to act on their behalf; or
- written permission is appropriate in the circumstances, the IO should contact the person seeking to make a complaint on a complainant's behalf or advise the complainant directly. The IO can give this advice either by phone or by writing.

In *Resolve*, both the details of the person making the approach on behalf of someone else and the details of the person to whom the complaint relates must be recorded. The primary complainant in *Resolve* is the person who has lodged the complaint and to whom communication should be forwarded. The Resolve record should indicate whether verbal or written permission was sought and the basis for that decision.

In cases where someone such as a community worker or immigration advocate frequently raises approaches on behalf of others, each approach on behalf of a different individual should be recorded as a new approach. Such approaches should not be linked by cross-referencing in *Resolve* unless there is some relationship between the content of the approaches other than the person lodging the approach.

In all instances people should be made aware of our Privacy Policy available on our website.

Approaches made by Members of Parliament on behalf of constituents

From time to time the office receives a complaint from a Member of Parliament. This is usually on behalf of a constituent, but may also be directly from the MP.

The Office's service standards apply to approaches from MPs. However, when handling these approaches please consider the following:

- they are marked 'sensitive' in *Resolve*
- the complainant (on whose behalf the MP is acting) may have experienced long delays in having their issues considered
- the Ombudsman will sign all acknowledgement letters and any other letters deemed to be particularly sensitive or high-profile
- the relevant Director or SAO will sign decision letters about straightforward, non-sensitive approaches.

For all letters to MPs that are to be signed by the Deputy Ombudsman or Ombudsman, please:

- assign the letter to the SAO in *Resolve* by assigning the relevant action, that is 'write to caller' or 's 12 to caller' and
- provide the complete hard-copy file for the approach, if any
- once cleared by the SAO, the SAO will assign the letter to the Deputy Ombudsman/Ombudsman and pass the copy along to him/her
- once the letter has been signed the complaint can be closed: there is no need to wait 28 days.

Handling a complaint brought by a Member of Parliament is just like handling any other complaint: MPs are not able to review, direct, or override our work under the Ombudsman Act.

Multiple complainants

There may be more than one complainant (i.e. co-complainants). If two or more complainants who share a relationship (e.g. marital, professional, and familial) complain to us about the same matter and we are aware of their relationship, they are generally regarded as co-complainants.

These variations need to be accurately recorded in *Resolve*.

Types of approach

Our core business functions include immigration detention review, inspection of records on selected law enforcement activities, own motion investigations, as well as approach handling and complaint investigations. The following are approaches:

- a new complaint (whether in or out of our jurisdiction)
- a complaint about us
- an FOI request
- a media enquiry
- a request for publications
- an outreach enquiry
- a request for information of a general nature as to the jurisdiction or services of our office
- a request for contact details for another agency.

Requests for information as to the jurisdiction or services of our office

The office records the giving of oral advice as an important part of the history of a complainant's dealings with our office.

Where the advice is of a very general nature or provided to an anonymous complainant, such contacts do not need to be recorded as approaches in Resolve. For example, an anonymous caller asking how we investigate a complaint should not be recorded in Resolve.

In all other cases, the advice given should be recorded in an approach record in *Resolve* against agency 'OMB', and subject 'Request for information'.

The following examples would be recorded as 'Request for information' in *Resolve*:

- I advised Ms F that the Ombudsman can look at complaints against the Australian Prudential Regulation Authority.
- I advised Mr Q that requests for review will only be considered outside the timeframe of three months where there are extenuating circumstances, and he should outline these clearly in his written request to the office.
- I advised Mr R there is no time limit on lodging of complaints.

Please note that in these examples the caller is not initiating or referring to a specific complaint but is requesting only information of a general nature. If the caller goes on to lodge a specific complaint or specifically to request a review, we follow the appropriate procedures for those types of calls.

Requests for contact details for another agency

Requests for the contact details of another agency are recorded as an approach against the agency, with subject ‘OOJ issue’, and minor subject ‘Australian government contact details’.

Requests for our contact details

The following are general corporate transactions and should not be recorded as approaches:

- a complainant checking on the progress of their complaint
- transferring a call to a member of staff
- a message taken for a member of staff
- a hang-up or incoherent call
- a wrong number
- a request for our contact details

General corporate transactions should not be recorded in *Resolve*, with the exception of a complainant checking on the progress of their complainant, which should be recorded as an action to the existing approach.

New Complaints

Out of jurisdiction

We receive a large number of approaches about agencies and bodies that do not fall within the Ombudsman's jurisdiction. If possible, these should be referred to an appropriate body. An approach is out of jurisdiction if it concerns:

- an agency not covered by any of the Acts under which the Ombudsman operates (known as an out of jurisdiction or OOJ agency), for example, 'I want to make a complaint about the NSW Police.'
- an issue that is excluded from the Ombudsman's jurisdiction (known as OOJ subject matter), for example, 'I work for Centrelink and I missed out on a promotion'.

Sometimes, the agency is within jurisdiction but the decision/action complained of is not e.g. 'I want to complain about the decision made by a Family Court judge' within a CSA complaint.

Within jurisdiction

We are authorised by the Ombudsman Act to investigate complaints about administrative actions of Australian Government departments and agencies. Some examples are:

- 'Centrelink has refused my application for the age pension and I want to make a complaint about their actions.'
- 'I'd like to complain to the Ombudsman about the calculation of my tax debt.'

For more information about assessing jurisdiction, see section 1.5 Agencies and actions within jurisdiction.

Existing approaches

Existing approaches

Approaches in relation to an existing complaint (for example, seeking a progress report) should be recorded in *Resolve* against the existing approach record and referred to the relevant officer for action.

Returning approaches

When we refer people back to the internal review systems of the agency complained of, we invite them to return to us if they are not satisfied with the way their complaint was handled by the agency.

If a person returns to us after attempting to resolve their complaint with the agency, this is a new approach.

Additional issues

- Related issue—if there is an existing approach under investigation and the complainant contacts us to raise a further issue that is related to the existing matter, include this as a new issue in the existing approach record.
- New issue—where there is an existing approach under investigation and the complainant contacts us to raise a new issue NOT related to the current approach (for example, a different agency) you should open a new approach.

Complaint raises a systemic or issue of interest issue
Some complaints may raise systemic issues such as an agency persistently not meeting statutory timeframes or where a complaint investigation identifies wrong advice contained in an agency manual.

There is also an Issues of Interest (IOI) function in *Resolve* to capture details of systemic and other IOIs that are additional to the resolution of a complaint or to our other investigative processes.

Refer to the Issue of Interest Reference Guide and see section 3.6 *Systemic and significant issues* for more information.

Dealing with the media

All media inquiries must be handled in accordance with the office's media enquiries protocol.

If you receive a call from the media, as per Step 1 of the protocol, record the journalist's question, journalist's name/media organisation and their contact details and any deadline. , deadline in the media log and explain that someone will return their call as soon as possible.

Decisions to make a public report and involve the media will be made by the Ombudsman, Deputy Ombudsman and relevant Senior Assistant Ombudsman. The Ombudsman is usually our spokesperson unless he authorises someone else to speak on his behalf.

We do not comment on matters under investigation, or even acknowledge that we have received an approach. We are obliged to investigate complaints in private and should not compromise our independence or jeopardise the credibility of our reports.

Information requests

Responding to an information request usually involves providing:

- information about the services and jurisdiction of the Ombudsman
- advice about complaint-handling procedures in other agencies
- advice about other complaint-handling units and administrative review bodies.

For example:

- 'Does the Ombudsman investigate complaints about lawyers?'
- 'Can you give me the number of the Social Security Appeals Tribunal?'

Information requests are often straightforward and there is no need for extra research. If this is the case, the receiving officer handles them wherever possible (usually the PCT).

While information requests are usually relatively simple to deal with, they are an important part of our work and the details should be recorded in *Resolve* against the relevant category (for example, media enquiry; research).

Note: In the first instance, Public Affairs/Communications should deal with information requests from the media, in consultation with the relevant SAO. All SAOs are advised of any media contact.

You should refer requests for our publications to the Corporate Strategy and Communications Team.

Multiple issues

An approach may contain more than one issue or relate to more than one agency. Some issues may be within jurisdiction and some may be out of jurisdiction.

These variations need to be accurately recorded in *Resolve*.

If an approach is about more than one issue, but each issue arises from the same action/decision with the same agency, this should be recorded as a single but multi-issue approach.

If an approach relates to more than one agency, separate approaches should be recorded against each agency. You should link these approaches using the cross-reference facility within *Resolve*.

Whistle-blower approaches

Prior to 15 January 2014 APS employees could inform an authorised person of a suspected breach of the Code of Conduct, also referred to as a whistle-blower complaint. Where an APS employee made a whistle-blower complaint to their agency and they remained dissatisfied with the outcome they are able to complain to the APS Commissioner or the Merit Protection Commissioner.

Public interest disclosure approaches

Since 15 January 2014, Commonwealth public officials can disclose information which they believe tends to show disclosable conduct and receive protection under the *Public Interest Disclosure Act 2013*. The term ‘public official’ is a broad term which includes former and current employees, appointees of a range of agencies that are connected with the Commonwealth, and contracted service providers to the Commonwealth and their employees.

The Commonwealth Ombudsman has a number of roles under the PID Act which broadly require the Ombudsman to:

- Receive, allocate and investigate disclosures about other agencies
- Receive complaints about other agency's handling or decision relating to PIDs
- Receive notifications from agencies relating to allocation decisions, decisions to not investigate and requests for an extension of time
- Assist agencies in relation to the operation of the PID Act
- Report annually on the operation of the scheme

In addition, as an agency of the Commonwealth, the Ombudsman is also required to receive PIDs relating to the Ombudsman's office.

For more information about public interest disclosures refer to the Public Interest Disclosure Procedures Manual.

ACT whistle-blower approaches

In the ACT the *Public Interest Disclosure Act 1994* provides that a person may disclose information to the Ombudsman that would otherwise be restricted, where that person has reasonable grounds for believing that information is evidence of:

- an indictable offence against the law of the Commonwealth, a State or Territory
- substantial waste of public funds
- 'disclosable conduct' (see the Act for the definition)
- a substantial danger to public health or safety.

This Act also provides protection for whistle-blowers by specifying that they shall not be subject to disciplinary action, and their employment shall not be prejudiced because of their disclosure.

The *Public Interest Disclosure Act 2012 (ACT)* provides a vehicle for any member of the public , including ACT public servants, to report wrongdoing in the ACT public sector. The ACT Ombudsman is a proper authority to receive and investigate such disclosures, which include: dishonesty or bias, misuse of official information, negligent or improper management of government funds, trying to influence a public official to act improperly and victimising a person because they have made a public interest disclosure.

2.3 Assessing approaches

Approaches that cannot be resolved in the course of the initial phone call (for example, by providing appropriate contact details, or an alternative complaint path) should be escalated to Category 2 for further assessment.

See The five category approach structure in section 2.2 for further explanation of the categories of approach.

Quick checklist: Initial assessment

- Is there any sensitivity attached to the approach? Should the Public Affairs/Communications Team be advised of possible media interest?
- Is the complaint from a Member of Parliament?
- Is the approach urgent?

- Is there any relevant information available on the issue (*Resolve*, WPM, intranet, specialist)?
- Are we the most appropriate body to handle the approach - should it be transferred elsewhere?
- Who, within the office, is best qualified to assist with the approach? (e.g. does it relate to a specialised area such as ATO, Defence, AFP – if so, consider contacting the agency specialist).
- Is more information required from the complainant before a decision can be made about whether to investigate the approach?
- Is more research necessary before deciding whether investigation is appropriate?
- Is investigation of the approach the most appropriate course of action? (see *Deciding not to investigate* for more detail)

Assessing priority

We aim to respond to approaches within our service delivery standards. However, we do not necessarily deal with approaches in the order we receive them. There are a number of factors that may give an approach a higher priority or require escalation, through sensitivity or urgency.

It is important to record any relevant information of this nature in *Resolve* against a new approach and to check for any alerts or sensitivities on existing approaches (or complainants).

Urgency

We receive a small number of approaches that can be considered genuinely urgent and should be given priority. You should record this in *Resolve* and notify your manager. Factors that may lead to the approach being considered urgently include:

- the immediate wellbeing of the complainant, e.g. income support, economic hardship or homelessness
- decisions that would be difficult to reverse, e.g. deportation, tender decision
- the likelihood that evidence will be lost if action is not taken immediately
- the likelihood that delays will make it more difficult to achieve a resolution
- a high public or political profile of a person or issues
- issues nominated as a high priority by the Ombudsman or specialists (these will usually be flagged within *Resolve* or on specialist team intranet pages)
- if an agency has agreed to stay (or delay) implementing a decision while we investigate the approach. Unnecessary delays can make the agency less willing to stay future decisions. There is also a danger that complainants will use the Ombudsman's office just to delay a decision-a problem that is minimised if we reach conclusions promptly.

Sensitivity

There are a number of factors that can result in an approach being more sensitive than others. These include approaches:

- from a Member of Parliament
- about which there has been Ministerial involvement
- about which there may be media interest
- from a potential discloser
- from someone making a potential public interest disclosure

- from someone in a correction facility.

If handling an approach of this nature, you should mark the relevant sensitivity field in *Resolve* according to the sensitivity definitions provided under 'Assessing priority'.
In most cases, sensitive approaches will be brought to your manager's attention through *Resolve* for escalation to a higher category. If you are in any doubt about the sensitivity of an approach you should discuss it with your manager. For example, approaches:

- about the head of an agency
- involving classified information
- involving other potentially sensitive information (for example, a well-known individual, or a member of staff)
- involving potential misconduct
- from an individual with a high public profile
- from someone threatening to go to the media.

Considering other relevant information

When assessing an approach, you should ensure you consider any other relevant Ombudsman information available to you before deciding what action to take.
Such information may include:

- the Work Practices Manual
- Ombudsman policy documents or minutes
- recent Ombudsman media releases
- specialist advice on the issue (including agency information sheets)
- Ombudsman legal advice on the issue
- agency specific arrangements—some agencies have special arrangements that should be considered in addition to these general guidelines. This includes the Australian Taxation Office (ATO), Defence and the Australian Federal Police (AFP).

This information will usually be available to you through a hyperlink in *Resolve* or the intranet.

You may also need to conduct general research, for example, by accessing agency websites, legislation, annual reports, media releases, and previous approaches of a similar nature through *Resolve*.

Seeking internal advice other than legal advice

Specialist 'strategic' teams provide expertise and support to IOs on their area of specialisation. They provide relevant training to IOs, identify systemic issues and manage relationships with agencies. Specialist teams also keep up-to-date information on the intranet about the agencies within their specialisation, including contact arrangements. It is expected that specialist teams and IOs will work together in a respectful and cooperative manner to resolve complaints.

Investigation officer seeks internal advice on a particular issue

IOs are encouraged to seek advice early to minimise the risk of unnecessary delay in the handling of a complaint and to ensure consistency of approach. Seeking advice will enable agency specialists to become aware of the issues that are generating complaints and highlight the need for the agency specialist to raise certain issues including systemic matters with the agency.

Advice can be initiated either by telephone, email or through *Resolve*. If the advice contributes to the analysis or resolution of the approach it must be recorded in *Resolve*. *It is the responsibility of both the agency specialist and the IO to ensure that such advice is recorded.* If the advice is sought:

- *through Resolve*— a 'Request internal advice' action is created by the IO and assigned to the relevant agency specialist. It should include a précis of the case and any deadlines, and should note the specific question about which the IO requires guidance, who the request is from, and the IO's job title. It is important that an agency specialist's role at the time of giving the advice is noted, as staff often move between, or act in different roles over time. The agency specialist records the advice in the 'Request internal advice' action above the précis of the case by the IO.
- *by email*—the IO must attach the email to the *Resolve* record
- *by telephone*—the agency specialist or IO must record the details of the advice in a 'Request internal advice' action within 24 hours.

If an IO seeks general background information from an agency specialist, or wishes to informally discuss a case, the advice provided does not need to be documented in *Resolve*. In some cases it may be necessary to send the file to the agency specialist. All file movements must be recorded on *Resolve*.

The agency specialist is expected to provide advice within seven (7) days of receipt of the request. If advice is not provided within 14 days the IO should close the action (with the appropriate status), which will escalate the matter to the SAO with responsibility for the agency.

The IO should follow the agency specialist's advice. Where there is disagreement about internal advice, the matter should be negotiated between the Directors of the relevant teams, and escalated to the SAOs if consensus cannot be reached.

Seeking advice from the Legal Team

IOs can seek legal advice directly from the Legal Team. Advice can be sought:

- through *Resolve*—a 'Request internal advice' action is created by the IO and assigned to the Legal Team. The action should include a précis of the case, an outline of the issues about which the IO requires guidance, and any deadlines. The Legal Team then records their advice in the 'Request internal advice' action above the details provided by the IO.
- by emailing the Legal Team—the IO must attach the email to the *Resolve* record. The request should be sent to all members of the Legal Team with a cc to the Deputy Ombudsman.

Seeking legal advice from external legal providers

Legal advice **must not** be sought from external legal providers. Only the Legal Team may seek external legal advice.

Specialist offers advice to investigation officer

Specialists have a role in promoting consistent decision-making and regularly conducting reviews of open and closed approaches relevant to their area of specialisation. Specialists may focus on issues such as:

- whether sufficient information has been gathered as part of an investigation
- whether there has been excessive delays
- whether the conclusion is reasonable and consistent with other similar decisions

- whether the office policy has been properly applied
- whether the IO properly understands the substantive issues involved in a complaint.

Referring a complainant

A referral occurs when we advise the complainant of another body that may handle their complaint. In contrast, a transfer occurs when we physically forward a complaint, and the associated documents, to another body.

Why we refer matters

We refer people to other agencies if, for example:

- the complaint can be better dealt with by another agency that specialises in that type of complaint
- another agency has special powers better suited to meet the person's needs
- the matter is outside our jurisdiction.

Approaches about the following matters are usually referred to other agencies:

- **Subject matter outside jurisdiction**—regarding agencies normally within our jurisdiction. For example, someone asking how they can vote in a Federal election when they will be interstate.
- **State matters**—approaches about State government bodies (excluding ACT government agencies) local councils, and requests for contact details for the State and Northern Territory Ombudsman.
- **Banking matters**—approaches about banks, credit unions and building societies, requests for contact details for the Financial Ombudsman Service.
- **Legal matters**—approaches about lawyers, judges, court decisions, requests for contact details for the Law Reform Association, Law Society, Legal Ombudsman etc. The Attorney-General's Department has a role in overseeing the way Australian Government agencies and their lawyers comply with the Commonwealth Legal Services Directions.
- **Commercial**—approaches about private or commercial companies, requests for contact details for agencies such as Consumer Affairs, Office of Fair Trading, and various industry regulatory authorities.
- **Employment** —approaches about employment-related issues, generally by people employed within the public sector, requests for contact details for the agencies that can advise and assist, including the Australian Public Service Commission.
- **Telecommunications** —approaches about telecommunications carriers and internet service providers, requests for contact details for the Telecommunications Industry Ombudsman (TIO), Australian Communication and Media Authority etc.
- **Insurance**—approaches about all types of insurance products (including health insurance), requests for contact details for the Private Health Insurance Ombudsman, Insurance Complaints and Inquiries Service etc.
- **Superannuation** —approaches about all types of superannuation products and providers (other than ComSuper, which is generally within our jurisdiction) as well as requests for contact details of the Superannuation Complaints Tribunal etc.
- **Health**—approaches about health industry matters or requests for information regarding regulatory bodies (for example, 'How do I complain about my treatment at X Hospital?')
- **Australian Security Intelligence Organisation (ASIO)** —approaches about ASIO, requests for contact details for the Inspector-General of Intelligence and Security (IGIS) who has jurisdiction over ASIO.

Deciding not to investigate

Section 6 (other than s 6(2)) of the *Ombudsman Act 1976* provides that the Ombudsman may decide not to investigate a complaint under certain circumstances. The same authority is provided in s 6 of the *Ombudsman Act 1989 (ACT)*. Likewise, s 19E and s 19Q provide for the exercise of discretion not to investigate complaints - as the Defence Force Ombudsman and the Postal Industry Ombudsman, respectively -in certain circumstances. (The circumstances for the various jurisdictions are not the same.)

Note that in some circumstances, rather than having a discretion *not* to investigate, there is no authority to investigate unless the Ombudsman is satisfied that there are special reasons to do so:

- Section 6(2) prohibits the Ombudsman from investigating a complaint if a complainant has sought review by a court or a tribunal unless he or she is satisfied that there are special reasons justifying an investigation..
- Unless there are 'special reasons', section 19E provides that the DFO may not investigate where a person could seek redress under the ADF scheme but has not done so or where a person has sought redress but 28 days have not yet elapsed. The DFO must consider the adequacy of a remedy granted following the redress process before investigating.

Deciding not to investigate: key principles

- This decision can be made at any time.
- Reasons include (for some but not all jurisdictions):
    - complaint not raised within 12 months of the person becoming aware of the problem
    - frivolous, vexatious or not in good faith
    - insufficient interest by the complainant (i.e. the complainant is not sufficiently connected to the matter)
    - investigation, or further investigation, is not warranted (e.g. the agency has provided a reasonable outcome, lack of evidence)
    - related to commercial activity
    - oral complaints that have not been reduced to writing as requested
    - when other avenues are available (e.g. where the complainant has not raised the matter with the agency, where the agency is still considering the matter)

The guidelines below explain the office's application of the discretion provided in s 6 of the Ombudsman Act to decline to investigate certain complaints.

The s 6 discretions limit the occasions when the Ombudsman *must* carry out the function of investigating following a complaint. The discretions should therefore be read consistently with the general intent of the Act that the Ombudsman should investigate following a complaint (see especially s 5).

Before you make a decision not to investigate (or conversely, to investigate as per s 6(2) and 19E) you need to ensure:

- you hold the appropriate delegation to do so
- there is no real or perceived conflict of interest or bias involved in you being the decision maker.

You should check the list of delegations on the intranet to make sure you hold the relevant delegation, before making a decision not to investigate under section 6 of the Act:

- Only EL2s or above can decide not to investigate under s 6(1)(b)(i), which relates to complaints which are judged to be frivolous, vexatious or not in good faith.
- Only EL1s or above can determine that there are special circumstances warranting investigation of a matter which is being, or has been, considered by a court or tribunal.
- Only SAOs and above can exercise discretion under s 6(16) and s 6(17), which relate to corruption issues that could be referred to the Integrity Commissioner.

As with any other decision we make, it is important that our decisions not to investigate are seen by both complainants and agencies to be impartial and independent. See Procedural fairness—Bias and Conflict of Interest for more information. If you believe there could be a conflict of interest—for yourself or one of your colleagues—speak to your manager.

Deciding not to investigate—declining and ceasing investigations

The decision not to investigate, or not to investigate further, can be made at any time after an approach is received. This includes declining to investigate an approach at the outset, (for example, where there is insufficient evidence) and deciding to cease an investigation at any point after its commencement (for example, on the basis that an appropriate remedy has been obtained or because further investigation is not warranted for any of the reasons provided in s 6).

For reasons of access and equity, you should carefully consider all the circumstances of the case before making your decision

What to consider

When making the decision not to investigate you should consider:

- whether the complainant has attempted to resolve their complaint with the agency or has used existing internal review mechanisms
- the significance of the matter to the complainant and the public interest
- possible outcomes—if no meaningful remedy is likely, it is usually better not to commence an investigation
- whether it is office policy to not investigate the type of approach. (However, even if the policy suggests that the complaint should not be investigated, you should still consider whether it would be unjust or unfair to apply the policy in the circumstances of the individual complaint).

Providing a service

Even when we decide not to investigate, we should provide other assistance to complainants, whenever possible. For example by:

- explaining the reasons for our decision
- explaining the role of the Ombudsman
- confirming facts and circumstances
- providing a better explanation of agency decisions or processes
- informing them about other appeal rights and the role of other administrative review bodies
- providing an appropriate referral or transfer.

You also should inform complainants of the right to request internal review of a decision not to investigate their approach (see section 4.3 Internal reviews).

Deciding not to investigate: relevant sections of the Ombudsman Acts (Cmlth for the Commonwealth Ombudsman, DFO, OSO and PIO; ACT Act for the ACT Ombudsman)

Description	Comwlth	DFO	ACT	OSO	PIO
complaint not raised within12 months old	6(1)(a)	same as Cmlth	6(1)(a)	19ZL(1)(b)(v)	19Q(1)(iii)
frivolous, vexatious, not in good faith	6(1)(b)(i)	same as Cmlth	6(1)(b)(i)	19ZL(1)(b)(i)	19Q(1)(i)
insufficient interest	6(1)(b)(ii)	same as Cmlth	6(1)(b)(ii)	19ZL(1)(b)(ii)	19Q(1)(ii)
not warranted in all the circumstances	6(1)(b)(iii)	same as Cmlth	6(1)(b)(iii)	19ZL(1)(b)(iii)	19Q(1)(iii)
commercial activity	s 6(12)	same as Cmlth	n/a	n/a	n/a
not raised with agency	s 6(1A)	n/a	s 6(2)	19ZL(1)(b)(iv)	n/a
still being considered by agency	s 6(1B)	same as Cmlth	s 6(3)	n/a	n/a
adequate review mechanisms available	s 6(4)	same as Cmlth	s 6(7)	19ZL(1)(b)(vi)	n/a
could be, or could have been, considered by court or tribunal	s 6(3)	same as Cmlth	s 6(6)	19ZL(1)(b)(vi)	n/a
written complaint requested but not received	s 7(2)	same as Cmlth	s 7(2)	same as Cmlth	same as Cmlth
reasons to transfer complaints to specific agencies	s 6(4D); s 6(6); s 6(9); s 6(13); s 6(20); s 6A; s 6B; s 6C	same as Cmlth	s 6A; s 6B	19ZK	19N, 19P
redress sought but not complete	DFO-specific	s 19E(1)(a)	DFO-specific	DFO-specific	DFO-specific
redress granted	DFO-specific	s 19E(1)(b)	DFO-specific	DFO-specific	DFO-specific
has not sought redress	DFO-specific	s 19E(2)	DFO-specific	DFO-specific	DFO-specific

Complaint not raised within 12 months

"s 6(1)(a) if the Ombudsman is satisfied that the complainant became aware of the action more than 12 months before the complaint was made to the Ombudsman"

The discretion not to investigate complaints over twelve months old recognises that when significant time has elapsed since the complainant became aware of the complaint, it becomes increasingly unlikely that a meaningful remedy can be achieved. This is particularly the case when investigation would be dependent on the memory of participants, where relevant officers or records may no longer be available, or when an action has been irretrievably overtaken by later events.

Nonetheless, depending on the particular circumstances of the case, the discretion may not always be applied. For example, where the action complained of has had a significant effect on the complainant and there is still a possibility of a remedy, we may consider investigating despite the time elapsed since the complainant became aware of the action.

The 12 month rule does not usually apply where the complainant has made every reasonable effort to resolve the matter with the agency throughout the intervening period, and approached us when that avenue failed (for example, if the agency has taken over 12 months to provide a response to the complaint).

The 12 month period is applied from the time the complainant became aware of the matter, not the time since the incident occurred, or the time since another person became aware of it.

Frivolous, vexatious, not in good faith

"s 6(1)(b)(i) – if, in the opinion of the Ombudsman, the complaint is frivolous or vexatious or was not made in good faith;"

This provision is not used very often, and should not be used lightly, as it implies an element of personal criticism. That should not however preclude its use when appropriate. This outcome can only be approved by EL2 staff or above.

This discretion can be applied to approaches lacking substance, potentially motivated by desire to cause trouble for an individual or agency, or there is documented evidence to suggest the complainant is deliberately withholding evidence.

This category can include repeat complainants.

The terms 'frivolous', 'vexatious' and 'bad faith' can be understood, with reference to judicial interpretation, in the following ways:

> **Frivolous**—of little weight, trivial, not worthy of serious notice, trifling. For example, complaints about a spelling mistake which in no way affects the meaning conveyed in a letter from an agency, or the colour of a person's shirt, could reasonably be considered "frivolous".
>
> **Vexatious**—instituted without sufficient grounds or for the purpose of causing trouble or annoyance to the other party. The Courts have described a vexatious claim as one that is 'productive of serious and unjustified trouble and harassment' or a claim that is manifestly hopeless.
>
> **Good faith**—an action is taken in good faith if it is done honestly, even if it is done negligently or ignorantly. Thus a person who makes a false or misleading complaint, but does so with an honest belief in its truth, even if 'honestly blundering and careless', will be acting in good faith. Conversely, an act made with knowledge of the

deception and with intent to defraud/deceive or to achieve a collateral outcome is not made in good faith.

In some cases an alternative to the use of this discretion may be provided by s 6(1)(b)(iii)—investigation not warranted in all the circumstances.

Insufficient interest

"s 6(1)(b)(ii) – if, in the opinion of the Ombudsman, the complaint does not have a sufficient interest in the subject matter of the complaint;"

'Sufficient interest' refers to whether the complainant is sufficiently connected with the matter.
This discretion may apply if the complainant lacks sufficient connection to the decision or action complained of, and is not authorised to act on behalf of the individual affected. (For example, "my neighbour is being victimised by Child Support but he doesn't know I'm calling").

The complainant should be directly affected by the decision or action being complained of, for example, by suffering some possible damage to proprietary rights, by having direct business or economic interests or in some cases, by having direct social or political interests (for example, as the office bearer of a community body).

A person whose interest is based solely on being a citizen, resident, taxpayer or member of the public would not usually have a sufficient interest in an administrative action. In such cases, the delegate may wish to consider whether the issue raised is one which could be investigated by the Ombudsman on an own motion basis (see also below).

The issue of personal interest does not arise where a complainant is acting on behalf of another person who does have a personal interest in the matter, for example, a solicitor, family member, MP, or welfare organisation. However, if a person claims to be representing another person it is important to establish that the third party has the consent of the person affected. It is customary to accept the word of an MP or legal practitioner that he or she represents or is acting for a named person in this regard. If you are not sure that such a complainant is acting on behalf of another person you should seek an authorisation.

Insufficient interest does not prevent us from investigating the matter if we consider it appropriate to do so using the Ombudsman's own motion power under s 5(1)(b). For more information, see section 3.8 Own Motion Investigations.

Not warranted in all the circumstances

"s 6(1)(b)(iii) – if, in the opinion of the Ombudsman: an investigation, or further investigation, of the action is not warranted having regard to all the circumstances;"

This provision can be used for a wide variety of reasons, including where a more specific reason does not apply, but we consider investigation is still not warranted. For example, where:

- there is no substance, i.e. no administrative problem involved in the complaint
- there is no useful or viable remedy available
- the agency has, without much pressure, provided a reasonable outcome and further investigation is unlikely to produce a better outcome
- the deficient action is relatively minor
- investigation not likely to be effective, e.g. lack of evidence
- approach concerned with 'high level' Government policy.

This authority will often be relevant where the agency has agreed to any suggestions made, a remedy has been achieved and there is no need to investigate further. The relevant issue here is whether the Ombudsman's office is satisfied with the outcome—the complainant's views and preferences are important, but they do not determine whether we consider anything would be gained by further investigation.

The use of this provision may be informed by the following factors:

Policy considerations
The Ombudsman's policies and priorities can be taken into account.

Resource constraints
The resources of the Ombudsman are not infinite and do not extend to investigating to a conclusion every aspect of every matter raised by a complainant. We can therefore reasonably compare the resources we would need to investigate the complaint against the likelihood of a useful outcome (either in the form of a remedy for the complainant or wider systemic improvements). Where we have investigated the main issue or issues raised by a complainant it may be appropriate to exercise this option in relation to the less significant aspects of the complaint.

Lack of specific details
This discretion may be applicable if a complainant has made allegations of a general nature but has failed to provide more specific details when requested to do so within a reasonable timeframe.

Lack of meaningful or viable remedy
This discretion may apply where no further meaningful or viable remedy is likely. For example:

- if a remedy has already been provided by the agency and investigation is unlikely to achieve a further remedy
- if a regulatory or law enforcement body has made a decision about pursuing a matter that is apparently lawful and consistent with its usual policies and resource allocation
- the remedy being sought by the complainant is not commensurate or likely to be achieved (for example, a change of Government policy or payment of a benefit to which they are not entitled) and it is clear that the complainant will not accept an alternative outcome.

It may be that there is a possible remedy but it is not sufficient to justify an investigation. For example, if an apology is the only likely remedy and one that will take substantial resources to obtain, the investigation may warrant less attention than one where a significant remedy could be achieved or the same remedy achieved at lower cost.

If a systemic issue has been identified but no meaningful remedy is available for the complainant, we usually finalise the individual approach and consider pursuing the systemic issue as a special project or own motion investigation. These options should be discussed with your supervisor/manager. See also section 3.6 Systemic and significant issues and section 3.8 Own motion investigations.

Minor matter
If the complaint concerns a relatively minor decision or action we may decide that investigation is not warranted in all the circumstances. For example, an officer not using a complainant's correct title may constitute a minor action, investigation of which is not warranted in all the circumstances.

Investigation not likely to be effective
Section 6 (1)(b)(iii) can be used for older complaints which do not fall within s 6(1)(a) above, but which we do not consider we could effectively investigate. Lack of available evidence may make it unlikely that an investigation will be effective. Similarly, a clear indication that a complainant will not accept any outcome other than that which he or she would prefer may make it unlikely that an investigation will be effective.

There may also be cases where we consider the nature of the Ombudsman process is inappropriate. See 'Other considerations' below.

No substance
If we are satisfied that a reasonable opportunity has been provided to the complainant to advise us of their concerns and issues, we can also take into account our assessment of the likely merits of the complaint on the face of it. For example, this discretion may apply if a complaint appears to have no real foundation from our knowledge of the subject area or of the circumstances of the complaint.

Commercial activity

s 6(12)—Commercial activity
"If the Ombudsman forms the opinion that action in respect of which a complaint has been made relates to a commercial activity of a Department or prescribed authority"

This provision may apply to actions or decisions that relate to the commercial activity, usually competitive in nature, of an agency, department or prescribed authority.

You should consult the relevant agency specialist before using this provision.

Contracting out
Some activities that might appear to be commercial in nature relate to the 'contracting out' of public services previously provided by government agencies. We would usually decide to investigate such cases, even if the agency argued they were 'commercial activity'. Matters of particular interest to the Ombudsman that we would usually investigate include:

- consumers' ability to obtain redress from contractors (who are providing a service on behalf of a government agency)
- misuse of statutory powers by third parties/contractors delegated or authorised to exercise those powers
- failure to enforce appropriate service standards
- fairness and probity of tender processes (see below) and any conflict of interest
- oppressive behaviour by agencies towards contractors.

Tenders
We would generally not apply this discretion in relation to complaints about the business transactions or dealings of departments and authorities that are incidental to the performance of their main functions, such as the purchase of goods and services through tender. However, it is possible that some other reason not to investigate may be appropriate, for example if the complaint would be better pursued through legal processes.

Monopoly providers
Some agencies are involved in competitive commercial activities but also have monopoly activities and have community service obligations and/or regulatory functions, for example, Australia Post in relation to some standard articles. We would generally not apply this discretion not to investigate complaints about the agency's monopoly activities, or in relation to its actions of a community service or regulatory nature. We would however normally

exercise this discretion not to investigate if the action is part of the agency's commercial activities in competition with the private sector. The basis for consideration in this way might be that the customer could go elsewhere and that the agency should not be placed at a disadvantage relative to its competitors who are not subject to Ombudsman oversight.

Other considerations
We should also consider whether other avenues are available to the complainant (e.g. small claims tribunals, consumer affairs, commercial tribunals, legal action under a contract, industry dispute resolution mechanisms or the ACCC). In the case of a broad complaint about the business decisions or pricing structure of a competitive commercial agency, we would normally decide not to investigate.

Written complaint not received

s 7(2)—Written complaint not received
Where a complaint is made orally, the Ombudsman may at any time require the complainant to reduce the complaint to writing and, where the Ombudsman makes such a requirement of a complainant, the Ombudsman may decline to investigate the complaint, or to investigate the complaint further, until the complainant reduces the complaint to writing.

Although the Ombudsman can receive complaints either orally or in writing, the Act enables us to require a complaint in writing, and to decline to investigate until the complaint is provided in writing.

This provision should only be used when we cannot investigate the complaint effectively without relevant documentation, for example, where the oral information is unclear or conflicting versions of events have been provided.

The complainant should be advised of the requirement to provide the complaint in writing and/or to provide the necessary background materials. They should also be advised that no further action will be taken unless and until a written complaint is received. If the client is unable to prepare a written complaint, it may be appropriate to suggest they seek assistance to do so.

Not yet raised with agency

s 6(1A)—Not raised with agency
Where a person has not complained to the department or authority concerned, the Ombudsman may, in his or her discretion, decide not to investigate the action until the complainant so complains to the Department or authority.

If a person has not yet complained to the department or authority concerned and we believe it is reasonable to ask them to do so, this discretion may be applied.

If we consider that the complaint is likely to be properly considered by the agency and the complainant has the ability to make a complaint directly to the agency, it is appropriate to advise them to do so.

It is reasonable for a department or authority to expect that it will generally have the opportunity to resolve a problem with the complainant, before the Ombudsman becomes involved.

You should consider:

- the ability of the complainant to effectively take up their complaint with the agency (ability to articulate the problem or to put it in writing for the agency if necessary; any language or cultural difficulties; etc.);
- the nature of the complaint—is it something likely to be resolved by the agency or is the matter so urgent, complex or sensitive that the Ombudsman should be involved? (Examples might include cases where an agency head is personally implicated and there is no effective process for internal inquiry or where a matter has complexities that mean that the usual internal complaint handling processes cannot be effective).
- the complaint-handling record of the agency—we may decide not to refer a complainant to an agency if our experience shows the agency has a poor history of dealing with complaints, the particular complainant or the particular issue.
- the possibility of using s 10 under which the Ombudsman has the power to issue a certificate that will enable an appeal to the AAT (or any other prescribed tribunal although to date no other tribunals have been prescribed), in appropriate cases. This is a matter to be discussed with senior management. Apart from the Ombudsman, only the DO is delegated to exercise this power.

Still being considered by agency

s 6(1B)—Still being considered by agency
Where a person …has complained to the Department or authority … the Ombudsman may, in his or her discretion, decide not to investigate the action unless and until the complainant informs the Ombudsman that no redress has been granted or that redress has been granted but the redress is not, in the opinion of the complainant, adequate.

If a person has complained to the department or authority concerned but that agency has not yet responded we do not usually investigate. Unless we believe there has been an unreasonable delay, we generally wait until the agency has finalised the matter.

This provision applies where the complainant has taken a matter up with the agency and the agency (or Minister) has not yet responded. The complaint to the agency could have been made directly or through an MP or the relevant Minister. This option is intended to avoid premature investigation by this office when the agency is already considering the complaint. It also avoids duplication of effort by the agency trying to respond to the complainant (or MP or Minister) and to our office at the same time.

In considering the use of this discretion, it is important to note that MP and Ministerial representations in particular may not necessarily lead to a departmental review of the matter.

Before deciding not to investigate, it may be appropriate to:

- satisfy yourself that the agency is addressing the complaint—if there appears to have been some delay in the agency's response, we might want to check that it is making progress before we use this option
- invite the complainant to contact us again if they are dissatisfied with the response or do not receive one within a reasonable timeframe.

At the end of an agency's own investigations, s 6(1C) provides that the Ombudsman shall investigate if, in the opinion of the Ombudsman there is no remedy provided by the agency to such a complaint within a reasonable time or the remedy is inadequate. While other discretions may be applied (subject to the other provisions in s 6), this suggests there should be a considerable weight in favour of investigation in such circumstances.

Internal review applies

s 6(4)—Adequate review mechanism available
Where the Ombudsman is of the opinion that adequate provision is made under an administrative practice for the review of action of the kind complained of.

If the agency has an effective internal review mechanism, we do not usually investigate. An internal review mechanism might be established under legislation or by the agency itself (e.g. review and complaints officer arrangements in various agencies).

We would not use this authority if:

- we consider the review mechanism is unlikely to be effective in the particular case
- the complainant is unable to access the review mechanism effectively (because of language difficulties for example, or mental disability)
- the costs or other barriers associated may be prohibitive for the complainant

Has been, or is being, considered by a Court or Tribunal

s 6(2)—Is being or has been considered by a court or tribunal
Where the complainant has exercised, or exercises, a right to cause action …to be reviewed by a court or by a tribunal constituted by or under an enactment, the Ombudsman shall not investigate, or continue to investigate… the action unless the Ombudsman is of the opinion that there are special reasons justifying the investigation of the action or the investigation of the action further.

The Ombudsman shall not investigate or continue to investigate unless there are special reasons justifying the investigation of the action. Note: rather than a decision not to investigate, this is a prohibition on investigating. Our authority here is to decide whether there are special reasons to investigate.

Note: only officers at EL1 and above have the delegation to decide whether there are special reasons justifying investigation (or further investigation). If you are below EL1 level but consider that there are special reasons to investigate then you should refer the matter to an EL1 or Director in your Team. IOs below EL1 level can exercise the discretion not to investigate in accordance with s 6(2).

Where the complainant has exercised or exercises a right to have the same action reviewed by a court or tribunal set up under an enactment, the Ombudsman shall not investigate, or continue to investigate the action, unless the Ombudsman is of the opinion that there are special reasons justifying the investigation (or further investigation) of the action.

Rather than providing a reason not to investigate, this provision prohibits us from investigating a matter that is or has been before a court or tribunal on the application of the complainant, unless there are special reasons to justify investigating. A matter that has been withdrawn or settled is affected by this provision—although the reasons for withdrawal may be relevant to assessing "special reasons". When litigation is settled, it is usually considered to be a settlement of all issues in dispute between the parties.

This provision does not relate to cases where someone other than the complainant brought the matter before the court or tribunal (for example, the agency or Director of Public Prosecutions) or a complainant raises an issue as a defence or counterclaim. However, if proceedings are at the instigation of the complainant, the complaint should not be investigated unless the Ombudsman (or his delegate) is of the opinion that special reasons exist.

Special reasons may include where the court/tribunal cannot or did not address issues we would address. In this case we may decide to investigate in parallel with the court case, although we would need to avoid addressing the same issues as the court. Special care would need to be taken to ensure that our processes do not conflict with, or possibly amount to a contempt of, a court's process or prejudice the capacity of any party to manage its part of the litigation.

Special reasons would not generally include circumstances where the complainant disagreed with the outcome or where the complainant alleges the court or tribunal was biased. In either of these instances it would be more appropriate for the complainant to appeal the court or tribunal's decision; in the second, the complainant could write to the head of the relevant court or tribunal.

We are not in a position to review the decision of the court or tribunal (which will usually be out of jurisdiction and which may be protected from inquiry). If the complainant alleges that the agency misled the court or tribunal, the first step would be to suggest that the complainant approach the relevant court or tribunal directly, or lodge an appeal. An allegation of a breach by an agency of the Commonwealth's Model Litigant policy should be discussed with the Legal Team.

If a complainant fails to obtain compensation after taking civil action in the courts, and we believe there nevertheless has been an administrative shortcoming, we may decide there is a special reason to pursue it, even though a court has reviewed the same action. We may also consider investigating in the case where a court or tribunal has dismissed an application but has suggested that some relevant matter (for example, an anomalous effect of legislation adverse to the applicant or the possibility of a CDDA payment) be raised with the

Ombudsman.

This authority only applies to courts and tribunals set up by or under an Act. It does not apply to tribunals that are only set up administratively by agencies or Ministers (in which case s 6(4) may apply rather than s 6(2)—see above). The Administrative Appeals Tribunal (AAT), Veterans' Review Board (VRB), Social Security Appeals Tribunal (SSAT), Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) are all set up under Acts.

This provision does not apply if a complainant states that they intend to take a matter to the courts or a tribunal (although we might consider other discretions). It must actually be (or have been) before the court or tribunal for it to apply. See also s 6(3)—right to be reviewed by a court or tribunal (below).

The Ombudsman report, *Commonwealth courts and tribunals: complaint-handling processes and the Ombudsman's jurisdiction* (Report No 12/2007), provides more information.

Could be, or could have been, considered by a Court or Tribunal

s 6(3)—Right to be reviewed by a court or tribunal
Where the Ombudsman is of the opinion that a complainant has or had a right to cause the action complained of to be reviewed by a court or tribunal but has not exercised that right, the Ombudsman may decide not to investigate the action or investigate it further if the Ombudsman is of the opinion that, in all the circumstances, it would have been reasonable for the complainant to have exercised that right.

If a person has not pursued their right to review by a court or tribunal, the Ombudsman may decide not to investigate if it he or she is of the opinion that, in all the circumstances, it would have been reasonable for them to exercise that right.

As with s 6(2), 'tribunal' means a tribunal set up under an Act.

This authority should not be applied automatically. You should establish the reason(s) why the complainant chose not to pursue this avenue. The level of costs involved or the uncertainties and delays of the litigation process need to be considered in deciding whether to decline to investigate. It is necessary to determine whether it is reasonable to expect the complainant to incur the cost of taking the matter to a court or tribunal, and whether it is an appropriate review mechanism. It may be, for example, that court or tribunal review would be unable to lead to a reasonable result because the outcome is dictated by law, the application of which would lead to an unreasonable result in the relevant case. Similarly, it may be that a tribunal could review a decision, but could not review (for example) the conduct of agency staff in their dealings with the complainant.

The following examples are provided to demonstrate when we might decline to investigate on the basis of s 6(3):

- a complainant is in dispute with an agency over an issue involving a significant amount of money, involving legal interpretation issues and there are rights of action available at law
- a complainant is seeking a remedy which we believe is unlikely to result from our investigation, (for example general damages being sought for defamation), but which may be available before the Courts.

Using this authority on a specific issue would not prevent us investigating related actions of the agency that would not be considered by the court or tribunal. For example, we may decide that the complainant should pursue the question of compensation, a customs duty, or a contract issue before the courts but we may pursue other actions of the agency that

appear to be deficient. If it is decided to undertake an investigation in such circumstances, you should consider whether it is best to do so once the court case has been concluded, to avoid difficulties associated with access to documentation and comment from the agency, and any possibility of contempt of court.

This discretion cannot be exercised on the basis that a complainant has a right to seek judicial review of the administrative action under the *Administrative Decisions (Judicial Review) Act 1977*. Paragraph 10(1)(b) of that Act provides that any right to seek judicial review of the administrative action under that Act must be disregarded when considering whether to not to investigate a complaint.

Deciding not to investigate DFO approaches

All the reasons outlined above apply to the Defence Force Ombudsman (DFO) jurisdiction, except s 6(1A), which relates to complaints not raised with the Department/authority within 12 months, if the approach is by a member of the Defence Force. There are three additional, specific reasons that apply to DFO complaints:

- s19E(1)(a)—redress sought but not completed.
- s19E(1)(b)—redress granted
- s19E(2)—has not sought redress.

s 19E(1)(a)—Redress sought but not completed
Where the member has sought redress, the DFO shall not commence to investigate before the twenty-ninth day after redress has been sought, unless the DFO is of the opinion that there are special reasons justifying investigation before that day.

This is a prohibition on investigating if the member has sought redress under the Defence Act less than twenty-eight days before making a complaint to the DFO unless there are special reasons justifying investigation before that day. This is intended to give the Australian Defence Force an opportunity to process the grievance before we become involved.

We have authority to investigate if we decide there are special reasons justifying an immediate investigation, such as urgency. Please consult the relevant SAO if you have a case like this.

Even after twenty-eight days we would not normally investigate a matter that is going through redress, although we often take up a complaint about delay in the redress process. If, however, there are special reasons justifying immediate investigation, such as urgency or indications that redress will serve no useful purpose, we will consider taking up the complaint without waiting for redress to be completed.

Please consult the agency specialist or relevant SAO if you consider a complaint should be investigated before redress has been fully processed.

This provision only applies to the first 28 days. If we declined to investigate a complaint made more than 28 days after the redress application we would use s 6(1B) – investigation not warranted- still being considered by agency.

s 19E(1)(b)—Redress granted
Where the member has sought redress, and redress has been granted, the DFO shall not investigate or investigate further unless the complainant notifies the DFO that the redress, in the complainant's opinion, is not adequate, and the DFO is of the opinion that the redress 'was not reasonably adequate'.

This provision prohibits us from investigating a complaint if redress has been granted on the same matter, unless approached by the complainant on the basis that the redress was not adequate and we decide that the redress granted 'was not reasonably adequate'.

This will depend on the circumstances of each case. Please consult the agency specialist or Senior Assistant Ombudsman before deciding to investigate a complaint where redress of some kind has been granted on the same matter.

s 19E(2)—Has not sought redress
Where a member of the Defence Force is able to seek but has not sought redress in respect of the action to which the complaint relates, the DFO shall not investigate the complaint unless he or she is of the opinion that the member was, 'by reason of special circumstances, justified in refraining from seeking redress'.

This provision prohibits us from investigating a complaint from a serving member if redress has not been sought, unless special circumstances exist which justify the member not pursuing redress. Examples of special circumstances may include matters of great urgency or seriousness that the redress process is unlikely to resolve. When considering urgency, note that administrative action by Defence can usually be suspended while a member is seeking redress. The clear legislative intent is that matters should be dealt with through the redress process if at all possible.

Please contact the agency specialist or SAO if you think special reasons apply and you are considering investigating even though redress has not been sought.

If spouse complains
If a serving member's spouse lodges a complaint that relates to the serving member, we would normally advise them that their spouse should seek redress (unless there are special reasons such as urgency). Otherwise the intent of s 19E(2) is being undermined. If, however, the action complained of relates directly to the spouse (such as allocation of married quarters), we would not necessarily decline the complaint just because the serving member has not sought redress. It would depend on the circumstances in each case and the agency specialist should be consulted.

If the serving member has already sought redress, we would not normally investigate a complaint by the spouse until the redress process is completed (investigation would not be warranted in all the circumstances). Special reasons such as urgency should be considered in consultation with the agency specialist.

Deciding not to investigate ACT approaches

The *Ombudsman Act 1989 (ACT)* also reproduces many of the reasons in the Commonwealth Act, as cause to decide not to investigate. Note that where we have decided not to investigate under s 6(3) and the complainant later returns, s 6(4) requires the ACT Ombudsman to investigate the complaint if they form the view that adequate redress was not provided by the agency.

Allocating cases

Approaches are generally allocated to the team and individual best placed to handle the matter. The office allocator, who is a member of the Operations Branch, provides a coordinated national approach to managing team workloads, allocates the complaints on a daily basis to each of the three Operations Teams. A nominated person in each Team then allocates them to individual IOs.

Generally, allocations are based on:

- each Operations Team's specialist responsibilities
- existing workloads and available staffing levels for each Operations Team for the relevant period—to achieve a more equitable distribution of workload throughout the office
- whether a Strategic Team has advised that certain approaches of specific interest or requiring special handling, are to be referred to them.

Where possible, the office allocator will also take into account the state of origin of the approach and the state in which the complainant resides when allocating casework.

Escalating cases

If an approach is not able to be resolved at a particular Category within the relevant timeliness standards (section 1.4 Service standards), it should be escalated. For example, if a matter is not able to be resolved over the phone at first contact, it will usually be escalated to Category 2 for further assessment.

Escalation reflects that more work is required to resolve the approach. It may also mean that more senior officers need to be involved. For example, if the officer cannot reach a resolution with the agency in Category 3, it may be escalated to Category 4 for specialist involvement, or for a s 9 letter to be sent to the agency, signed by the relevant SAO.

In some cases, if a matter is not able to be resolved at Category 4, the approach will be escalated to Category 5 for a s 15 report from the Ombudsman. This process is reflected by the five category approach-handling structure and within *Resolve*. See section 2.2 Approaches: Five category approach-handing structure for more detail.

Transferring matters externally

Transferring matters: key principles

- We transfer complaints to external bodies (Australian Crime Commission, Integrity Commissioner, Australian Information Commissioner, Employment Services Regulatory Authority, Australian Communications and Media Authority, Australian Public Service Commissioner, industry Ombudsmen such as the Telecommunications Industry Ombudsman or the Financial Ombudsman Service) if the matter is within their jurisdiction and could be more effectively dealt with by them.
- Contact the 'receiving body' to ensure the matter falls within its jurisdiction and it would be willing to receive the complaint.
- If a complaint raises a 'significant corruption issue' which could be investigated by the Integrity Commissioner then the complaint must be transferred to ACLEI.
- Contact complainant and seek their consent before transferring a complaint.
- Transfer complaints as soon as practicable, inform the complainant in writing and give the other body any information and documents related to the complaint.

Transferring matters

A 'transfer' occurs when we physically forward a complaint, with any associated documents, to another body. (A 'referral' on the other hand involves advising the complainant of another body that may better handle their complaint).

When assessing an approach, you should consider whether the matter should be transferred elsewhere in accordance with s 6 of the Ombudsman Act. If you are not sure, you should consult the Legal Team.

Why we transfer matters

Section 6 of the *Ombudsman Act 1976* specifically empowers this office to transfer complaints to some complaint-handling bodies.

The office can also transfer complaints to other bodies not specifically mentioned in s 6. Before deciding to transfer a matter, we must form the following views:

- that the matter falls within the jurisdiction of the other body
- that the alternative body could ‘more conveniently or effectively’ deal with the complaint.

How we transfer matters

When we decide to transfer matters, the Act requires us to:

- transfer the complaint as soon as practicable
- inform the complainant in writing that the complaint has been transferred
- give the other body any information or documents related to the complaint that are in our possession.

Complainants may not be comfortable with us transferring their private papers and information to another body without consultation. For this reason, it is our office policy to contact complainants and seek their consent **before** transferring a complaint.

You should contact the 'receiving body' in the first instance to confirm that the matter falls within its jurisdiction and it is willing to receive the complaint. The Ombudsman Act requires us to consult with the Office of the Australian Information Commissioner before transferring matters to that agency. There is an MOU in place between the Ombudsman and the Australian Information Commissioner.

Template letters for both the complainant and the receiving agency are located on the intranet.

2.4 Investigating approaches

You have arrived at a decision to investigate if an approach cannot be resolved in Category 1 or 2 and you have determined that:

- the issues are within jurisdiction (see section 1.5 Jurisdiction)
- the complainant has already complained to the agency
- it is more appropriate for the Ombudsman to deal with the approach than to transfer or refer it elsewhere
- there are no reasons why you should decide not to investigate (see section 2.3)
- you need to contact the agency to resolve the approach.

An 'investigation' begins when you contact the agency. Before you take this important step,

you need to prepare an investigation plan and escalate the approach to Category 3 within *Resolve*. For new IOs, this involves seeking the agreement of your manager to proceed.

Quick checklist: Conducting investigations

Conducting Investigations

- Follow the basic investigation principles—be impartial and independent, do not prejudge issues, and do not present opinions contrary to those of the office.
- Acknowledge the approach and explain the process to the complainant.
- Refer to all available resources (e.g. legislation, policy, intranet, WPM).
- Plan the investigation.
- Consult with colleagues and seek advice as needed (for example, from the agency specialist, Legal Team or your Manager).
- Communicate regularly with the complainant and agency.
- Comply with agency communication protocols
- Use appropriate language when contacting agencies (for example, use neutral terms such as 'the complainant says' or 'the complainant claims' until you are sure you have all the information).
- Consider the most appropriate way to communicate the complainant's information to the agency (that is, paraphrase the information or include a copy of the complainant's letter).
- If appropriate, identify and negotiate the most appropriate remedy (for example, an apology, change of decision, or a change of procedures).
- Record all information in *Resolve*.
- Escalate the matter if you are unable to resolve it.

Investigation principles

These basic principles apply to all investigations:

- **Be impartial and independent.** We do not represent complainants or agencies. Rather, we conduct impartial and independent investigations of administrative decisions and actions.
- **Do not prejudge the issues.** Keep an open mind about the merits of the complaint. You should put allegations or new information to the other party for comment before forming conclusions. Obtain the agency's perspective about the issues before recommending any remedial action.
- **Present the 'office' position.** When dealing with complainants and agencies, do not present personal opinions that are contrary to established office positions (i.e. do not compromise the office).

Preparing an investigation plan

All investigations, whether straightforward or complex, require a planned and structured approach.

Preparing an investigation plan helps you to focus on what you are investigating and why. An investigation plan also allows you to record your reasons for pursuing a particular course/s of action.

Your initial investigation plan should identify:

- the issues at the heart of the complaint
- whether there are any known issues and information about the matter (such as IOIs, FAQs)
- your proposed plan of action (for example, what information you will be seeking from the agency; what other resources should be consulted)
- possible remedies.

You should document the investigation plan in *Resolve* using the template provided.

Planning and conducting an investigation is a dynamic and ongoing process. While the majority of investigations are completed in a single contact, it is not always possible to know at the outset how the investigation will develop, and more complex investigations can extend over long periods. By revisiting your investigation plan regularly, and discussing issues that arise with your manager, you can keep the investigation on track. It is important to:

- seek regular advice as the investigation progresses
- keep your plan up to date, documenting and placing on *Resolve* any required changes to the investigation plan as circumstances change and new information becomes available
- regularly assess the appropriateness of the investigation 'category' and whether the investigation should be escalated.

Contacting the agency

Contacting the agency is the trigger for beginning an investigation. Officers should not take this step before gaining the agreement of their manager through *Resolve* if required. When contacting the agency, the following should be kept in mind.

Preliminary research

Before contacting the agency it is important to complete a reasonable level of research, including searching for similar complaints that have been finalised, familiarising yourself with relevant sections of the legislation and published agency administrative guidelines, and discussing the case with specialist teams (if appropriate). Understanding the specific lines of inquiry and remedies provided in similar cases before your initial contact will help to ensure that you obtain a complete response and will reduce the need for follow up requests.

Appropriate language

When talking with or writing to agencies, use appropriate language. For example, do not suggest fault if all the circumstances are not yet clear and agreed. Present issues in neutral terms such as 'allegations'. Use mitigating language when presenting arguments or conclusions, such as 'it appears that...' or ‘Miss B claims that…’.

Templates and house style

Our Ombudsman Style and Presentation Guidelines include information on house style. Templates for most types of correspondence are also included in *Resolve*. All correspondence associated with approaches should be created within *Resolve* and stored within the relevant approach record.

First contact

The aim of the initial approach is to get the agency's version of events, additional information or relevant documents.

No matter how you make your first contact with the agency, whether by phone, fax, email or letter, you should comply with our agency contact protocol agreements (see section 2.1 Our contact protocols). The agency contact protocol agreements may set out how the contact is to be made, as well as whom to contact. If in any doubt, check with the relevant agency specialist or SAO.

If there is no contact person nominated for an agency, first contact must be with the head of the agency. **Note:** if this is the case, you will need to escalate the investigation to Category 4 to allow an officer with the appropriate delegation to sign the letter to the agency (unless the matter involves the Overseas Students Ombudsman function).

You should **not** contact the original agency decision-maker in the first instance. They may not be fully aware of our role or powers, or the agency protocols for dealing with our office. Doing so also contradicts the agreed contact arrangements with that agency. If you need direct access to decision-makers, ask the agency contact officer to organise it.

Your email or letter to the agency should set out clearly the issues that are being pursued and the questions the agency is asked to address.

You should take particular care in structuring and proofreading s 8 notices. In particular ensure that:

- the complainant's name is spelt correctly
- the departmental reference is correct
- all key issues are included.

Where errors occur in the details identifying the complainant, it can cause an agency substantial work in identifying the case in question and will not assist agencies to resolve matters quickly. Where issues are left out, it can be frustrating for an agency to consider that it has resolved the complaint only to find further issues are being raised at a later stage.

It can be appropriate to outline the context of the matter as this often helps an agency understand the issue we might have and can prompt it to provide more useful or timely information.

It may be useful and appropriate to attach a copy or an extract from the complainant’s correspondence to the Ombudsman. There is no firm rule on this: each case should be considered against its particular circumstances. Generally, it will be more efficient for us to make inquiries without providing copies of correspondence.

Furthermore, you should always exercise caution before sending a copy of the complainant’s correspondence to the agency. Ensure that the complainant has no concerns and that the complaint is clear and politely set out in the letter. It would usually be inappropriate to send a copy if the complainant does not agree.

Above all, it should be clear to the agency that it is being asked to respond to the complaint as framed by the Ombudsman’s office, and not the text of the complainant’s correspondence.

Historically, agencies have been provided with 28 days in which to make a response. However, circumstances of the complaint may be such that a shorter period is more appropriate.

Straightforward investigations

In the most straightforward investigations, a resolution can often be negotiated by a single phone call to the appropriate established agency contact.

You may also fax or email a summary of pertinent issues and other relevant documents obtained from the complainant. Agency contacts may refer you to decision-makers, line managers or policy staff to obtain information directly.

The agency will usually respond with its version of events, additional information or a resolution to the problem.

After the initial approach, you can usually decide how to pursue the investigation. For example, if the first contact indicates a satisfactory conclusion is likely, it may be appropriate to continue the investigation by informal contact, such as by phone or email.

Contacting an agency other than the agency complained about

There may be occasions when it is necessary to contact an agency other than the agency complained about. Sometimes other agencies are able to provide relevant information even though they are not the subjects of the approach. This may be the case when another complaint-handling body or a state, private or welfare organisation is involved. Subsection 8(3) of the Ombudsman Act expressly authorises contact with alternative agencies in the course of an investigation.

However, these circumstances are distinct from those occasions where it becomes apparent that the complaint is actually about a different agency than the one originally recorded as the subject of the approach—for example, an approach is recorded as being about the Australian Taxation Office but turns out to be about the Department of Human Services (Child Support). In those cases, the original approach should be closed and a new approach opened in relation to the correct agency.

It may also appear in the course of an investigation that the complaint is about another agency as well as the original agency complained about—for example, a complaint is made about the Department of Human Services (Child Support) and investigation reveals that the Australian Taxation Office may have given incorrect information to the Department of Human Services (Child Support). In such cases you would open a new approach in relation to the second agency, and the original approach might be kept open depending on whether there were outstanding issues to investigate about the first agency.

There is no requirement to seek the authorisation of the complainant to contact alternative agencies. However, if the complainant advises that they do not want alternative agencies to be contacted in the course of our investigation, you should advise the complainant of the legal authority of the office to do so.

If the complainant remains of the view that the alternative agency should not be contacted, you may decide to cease investigation of the approach

Complaints related to debt recovery

Background

Some complaints handled by this office relate to debts being recovered from the complainant by an agency. Occasionally a complainant will request that the debt recovery be deferred until the complaint is resolved, or an IO will consider it appropriate to defer the recovery. It should be noted that no power exists in the Ombudsman Act to require an agency to defer a debt recovery, and there is no requirement for an agency to comply. However, agencies often recognise that deferral is appropriate when there is doubt about the legality or process of the debt recovery.

If the circumstances of a complaint warrant a request for deferral of debt recovery, a briefing should be made to the relevant SAO seeking approval to request the deferral. The SAO can then make the recommendation to the appropriate agency representative. Decisions to request that an agency defer debt recovery action should not be taken lightly. SAOs should consider:

Agency internal procedures

Most agencies have an internal review process for debt recovery and guidelines on hardship circumstances. In line with the office policy on accepting complaints, where the possibility exists for an internal review, that avenue should be followed before this office becomes involved in the matter.

Where no avenue for internal review exists, often it will be possible under relevant agency legislation to pursue the matter in a related tribunal.

Secondary purpose

It should be noted that the decision to request a deferral of debt recovery might result in the complaints process being misused. It is possible that a complaint could be lodged to delay the repayment of a genuine debt while avoiding associated costs.

With these considerations in mind this office should not request deferral of a debt recovery unless there are compelling reasons to do so.

Public Governance, Performance and Accountability Act 2013

On 1 July 2014 *the Financial Management Accountability Act 1997* (the FMA Act) ceased to be the central piece of legislation that oversees the Commonwealth's financial and governance transactions.

The Public Governance, Performance and Accountability Act 2013 (the PGPA Act) replaced the FMA Act.

Debt write-off and waiver within Australian government agencies must comply with the PGPA Act and the PGPA Rules if the agency falls under that Act. (Government agencies that are not 'Commonwealth entities' as defined by the PGPA Act, eg Commonwealth companies, may have other arrangements for debt write-off or waiver. It is not possible for an agency to decline to recover a debt unless a decision is taken in accordance with the PGPA Act and the PGPA Rules. The debt recovery rule – PGPA Rule 11 – is essentially the same as they were under s 34 of the FMA Act.

The PGPA Act also provides that a waiver request can be made to the Finance Minister. It is also open to a complainant to dispute a debt in a court of competent jurisdiction.

Evaluating the agency's response

It is important that our office critically evaluates an agency's response to a complaint.

When you have received a response or documentation from the agency, you should evaluate the adequacy of the response by:

- assessing the agency's comprehension of the issues presented—does the agency fully understand the facts and arguments in your communication?
- reviewing the completeness of information supplied by the agency in response to your request—has the agency addressed all the issues and requests you presented?
- identifying disagreements about the facts—is there a dispute about the details of what actually occurred?
- identifying disagreements about the lawfulness and reasonableness of the agency's actions—is the agency disputing whether their decision or action was unlawful or unreasonable or would otherwise require a remedy?

In examining an agency's response, IOs should pay particular attention to signs that something does not make sense, for example the absence of a critical document from the file, anomalies around dates, or evidence of miscommunication.

Be aware that different agency officers have different perceptions of issues and face differing demands (for example, there may be no incentive for debt collectors to be sensitive to complainant hardship issues).

If the agency contact has limited delegation or discretionary power to implement the remedy you consider appropriate (for example, to change decisions or refund fees) you should escalate the investigation to Category 4.

The agency may provide new evidence or argument that had not been previously considered. You may need to undertake additional research or seek specialist opinion (for example, the Legal or Strategic Teams) to assess the implications of this new information. Further information is available in section 2.3 Seeking internal advice other than legal advice.

If you run into 'dead-ends', consider discussing issues with your manager or the agency specialist. It may also be appropriate to escalate the investigation.

Returning to the agency

After evaluating the agency's response, it may be necessary to communicate with the agency again to:

- further emphasise the issues previously raised
- respond to new information or argument from the agency
- present the complainant's latest response.

Pressing the agency further for either evidence or corroborating materials does not suggest that we are implying dishonesty on the agency's behalf. Part of being impartial and independent requires us to critically examine the information provided by both the complainant and the agency. See section 3.3 Pursuing issues with an agency.

At this stage, it may be appropriate to put these issues in writing. Written contact is usually appropriate where:

- the issues are more complex
- there is a history of written contact in regard to the investigation

- oral approaches have shown that the agency is unwilling or unable to rectify an error.

If unsure of the appropriate format or approach, you should discuss with your manager. In any case, you should ask your manager or another officer to check the letter before you send it.

Note: The Ombudsman has a clear policy on signing letters to agencies, particularly those to principal officers. See section 2.1 Our contact protocols.

You should note also that s 12 (4) of the Ombudsman Act allows only nominated officers (EL2 and above) to make comments or suggestions to Departments or persons.

Agencies are generally given up to 28 days to respond to correspondence although a shorter period may be appropriate especially if the need to contact the agency is for the purposes of a short follow up. *Resolve* will prompt you to follow up overdue responses. Long overdue responses may require escalation of the investigation, and a formal reminder from a SAO, the Deputy Ombudsman or the Ombudsman.

Keeping complainants informed

Our policy is to keep complainants informed of investigation progress. This includes making regular contact if the investigation takes longer than a few weeks to resolve, and informing them of any decisions you make.

Section 12 of the Ombudsman Act requires us to inform a complainant if we are not going to investigate, or are ceasing to investigate, a complaint.

Where there is a difference between the perspective of the complainant and the agency it is important to make a deliberate judgement as to whether it is reasonable to accept the agency's view or the complainant's view. In some cases it may be impossible to form a view as to which version is accurate and this may need to be explained to the complainant.

Regular contact with the same IO helps to reassure the complainant that we are taking all possible steps to resolve their complaint. Where circumstances require the transfer of a case, for example if an IO goes on long-term leave, or separates from the office, it is that IO's responsibility to advise the complainant of the transfer of the open case to a new IO.

More information on when and how to communicate with complainants can be found in the following sections:

- providing regular progress reports as per our service standards (Section 1.4)
- providing complainants' access to their own approach files (see Seeking Information on our website)
- policy on signing letters (see section 2.1 Who should sign)
- explaining decisions not to investigate (see section 2.3 Deciding not to investigate)
- complying with privacy and confidentiality requirements (see section 1.8 Handling confidential information).

2.5 Concluding investigations

Determining appropriate remedies

When investigation has established that an error has occurred, which the agency acknowledges, you should consider if there is appropriate action the agency can take to remedy the problem.

This may mean a remedy for the complainant, or a change to an agency policy or process. For example, an agency may agree to reinstate a benefit or change its procedures after the first contact.

When considering the range of possible remedies, the following questions may be helpful:

- what is the complainant seeking?
- has the agency made any offer(s) of settlement/remedy?
- what remedies, if any, are provided in the relevant legislation?
- is there a better remedy available in another jurisdiction (for example, Administrative Appeals Tribunal, Australian Information Commissioner, Australian Human Rights Commission)
- what other options are available (for example, compensation, law or policy change, apology, reinstatement of benefit etc.)?
- is it necessary to negotiate or mediate between the complainant and the agency to obtain an agreed remedy? Note: If this is the case, the investigation should be escalated to Category 4.

IOs at APS levels four to six and EL1 should ask the agency whether an appropriate remedy has been or would be considered.

Sometimes an agency may agree that a problem has occurred, but not agree that a remedy is warranted or disagree on what remedy is appropriate or the quantum of an accepted remedy. If this is the case, you should escalate the investigation to Category 4.

If the agency does not respond to a question about the remedy, or responds negatively, you should escalate the matter to an EL2 officer or above, with a view to continuing the investigation. See section 3.3 Pursuing issues with an agency.

Section 12 of the Ombudsman Act sets out the Ombudsman's obligations to notify complainants and agencies when an investigation is declined or ceased, and to provide particulars of the investigation and any comments or suggestions that the Ombudsman chooses to provide. The power supports the office's practice on occasions of providing helpful comments to agencies or complainants under s 12(4). Staff at or above EL2 can exercise this power in consultation with the relevant SAO.

If the agency does not respond to less formal prompting under s 12 (4), a formal s 15 report should be considered.

Recording appropriate remedies

Quick checklist: Possible remedies

Possible remedies

- 'Better explanation – by Ombudsman': where we provide a better explanation of a decision or process
- 'Remedy provided by agency without Ombudsman intervention': where an agency reaches a decision or remedy without our input, or before we have begun our investigation
- 'Decision changed': where an agency changes a decision as a result of our investigation
- 'Action expedited': where we expedite delayed action, for example the processing of an application or review by an agency
- 'Agency apology': where we secure an apology from an agency to a complainant
- 'Better explanation – by agency': where we secure from an agency a clearer explanation for decisions and actions
- 'Change to policy/practice/law': where our action leads an agency to change its policy or practices, or develop legislative amendments
- 'Change to procedure': where our action leads an agency to change its procedures
- 'Payment granted', 'Payment increased', or 'Payment restored': where our action leads to an agency granting, increasing or restoring a payment
- 'Debt waived or reduced': where our action leads to an agency writing off, waiving or reducing a debt
- 'Penalty waived or reduced': where our action leads to an agency writing off, waiving or reducing a penalty
- 'Other financial remedy': where our action leads an agency to provide another financial remedy (e.g. to make an ex-gratia payment)
- 'CDDA Scheme payment': where our action leads an agency to make a payment of compensation under the CDDA Scheme
- 'Act of grace payment': where our action leads an agency to make a payment under Act of Grace provisions
- 'Agency officer counselled or disciplined': where as a result of our action an agency takes disciplinary action against a staff member
- 'No remedy': where no remedy was possible.

Apologies

Apologies can be highly effective in addressing the needs of people who have been wronged. Where a mistake or error has led to harm, complainants often see an apology as essential to the proper resolution of their complaint.

What is an apology?

An apology is an expression of feelings that can include sympathy, remorse or regret as well as an acknowledgement of a fault, shortcoming or failing. It communicates a message that may pave the way for reconciliation.

The most appropriate form of communicating an apology will depend on the circumstances of the particular case, the harm suffered, and what you hope to achieve by giving the apology, for instance, acknowledging the wrong done or providing an assurance that the problem has been addressed.

Even if a full apology may not be justified or warranted, a sincere expression of empathy, or regret for the suffering of others may still be appropriate. Partial apologies can include:

- expressions of sympathy or empathy alone e.g. 'I'm sorry this has happened to you'
- expressions of regret for the act or its outcome alone e.g. 'I regret that this has happened'
- expressions of sorrow alone e.g. 'I'm very sorry for what has happened'
- acceptance of responsibility or fault e.g. 'I take full responsibility for what occurred'.

Many people who have experienced harm or otherwise been wronged want nothing more than to be heard and given an explanation and an apology. A prompt and sincere apology can avoid more costly and time-consuming disputes. Apologies also help to:

- restore dignity, face and reputation
- provide vindication, a sense of justice or an acknowledgement that the recipient was right
- allow for the acceptance of responsibility for actions or ownership of a problem
- lead to a greater willingness to resolve a dispute
- build trust
- contain potential negative repercussions such as bad publicity or legal action
- create, or lay the groundwork for a constructive relationship
- re-establish credibility.

Key principle

When an error has been made, public sector agencies and their staff should accept responsibility and take ownership of the problems they are responsible for. This is what good management practice dictates, ethical conduct requires and the public expects. It is also fundamental to transparency and accountability in public administration.

Legislation in some states and territories provides that an apology cannot be used in evidence as an admission of fault or liability (for example, *Civil Law (Wrongs) Act 2002* (ACT) s 14). Australian Government agencies can rely on those legislative provisions if proceedings against the Commonwealth are being heard in a state or territory court. Beyond that, in circumstances where there is no explicit legislative protection, it is unlikely that a court would treat an apology by an agency as an admission of liability. There are many examples in Ombudsman work of agencies apologising without legal complication. In fact, there are many examples of an apology effectively resolving a complaint and averting the risk of escalation into a legal dispute.

Apologising for an error you or another IO have made in the complaint-handling process

If you are handling a service delivery complaint and you become aware that there has been an error in the complaint-handling process, you should offer an apology to the complainant. Even if the error was unsubstantiated, it may still be appropriate to express empathy for the position of the complainant.

Passing on an apology from the agency

If, in the course of an investigation, the agency complained about expresses regret or apologises for an error, you should communicate this to the complainant.

The most appropriate method of communicating an apology from an agency will depend on the circumstances of the complaint. The following is a suggested example:

"We have brought the error to the attention of the agency, and the agency acknowledges/apologises/regrets the error and the impact the error has had on you. The agency has offered to take (x action) to provide redress and/or to prevent this from occurring again."

Where possible the agency should be encouraged to do this itself.

Advising the agency to apologise

EL2 officers and above have delegation to make suggestions to agencies under s 12 (4) of the Ombudsman Act.

If you believe that an agency should offer an apology to a complainant as an appropriate remedy, you should:

- Affirm the Ombudsman's position that apologies are fundamental to transparency and accountability in public administration.
- Outline that there are significant advantages in offering an apology, where warranted. For example, possible outcomes include ending the complaint, avoiding litigation, building goodwill and trust, and laying the foundation for a positive ongoing relationship with the complainant.
- State that the Ombudsman's Office has not identified any legal impediments to agencies offering apologies to members of the public. However, the agency should seek legal advice where no internal policy advice exists.

The content of an apology

The chances that an apology will be effective are greatly increased if it addresses the 'Five R's as follows:

Recognition—a description and recognition of the wrong and an acknowledgement of the harm caused.

Responsibility—an acceptance of responsibility.

Reasons—an explanation of the cause.

Regret—an expression of sincere sympathy and/or regret.

Redress—an indication of the action taken, proposed or offered to address the problem and an assurance that action has been taken to prevent recurrence of the harm.

Things to be avoided

Including or omitting things that immediately prompt the recipient to question the sincerity of the apology can significantly reduce its effectiveness. It is particularly important to avoid the following types of apologies:

Inaccurate apologies—apologies that inaccurately identify the issues of primary concern to the recipient.

Misguided apologies—apologies for action/inaction or harm for which there was no obvious responsibility.

Generalised apologies—apologies that fail to identify the relevant problem, fault or mistake.

Avoidance apologies—apologies that try to excuse or avoid responsibility, focus on the action or reaction of the recipient, and/or question whether there was a problem.

Conditional apologies—apologies that question whether the recipient was harmed.

Impersonal/untargeted apologies—apologies in form letters and/or apologies that do not identify the recipient.

This information has been adapted for use by the Commonwealth Ombudsman's Office from the NSW Ombudsman's publication Apologies—A practical guide (2nd Edition).

Financial Remedies

There are four mutually exclusive avenues available for most agencies to pay compensation:

- settlement of monetary claims against the Commonwealth ('legal liability')
- compensation for detriment caused by defective administration
- act of grace payments
- ex gratia payments.

The Department of Finance administers the Australian Government's Discretionary Compensation and Waiver of Debt Mechanisms.

Settlement of monetary claims against the Commonwealth ('legal liability')

A claim can be settled out of court if there is a meaningful prospect of liability. An agency may settle a claim under $25,000 on the basis of a common sense view that the settlement is in accordance with legal principle and practice. No external legal advice is required.

Claims above $25,000 can be settled if the CEO or authorised officer agrees with written advice from the Australian Government Solicitor (AGS) or another legal adviser external to the agency that the settlement is in accordance with legal principle and practice.

Compensation for detriment caused by defective administration (CDDA)

This is a non-statutory scheme, introduced in 1995, to provide compensation for detriment suffered as a direct result of 'defective administration' by an Australian Government agency. The main features of this scheme are:

- the detriment can be financial or non-financial
- the definition of defective administration must be met
- any compensation for non-financial loss (e.g. pain and suffering) must be determined in accordance with legal principles and practice
- the scheme does not apply to any claim where it is reasonable to conclude the Commonwealth would be found legally liable if the matter went to court.

Act of grace payments

The Finance Minister or her delegates have the statutory authority to approve a payment in special circumstances. The Minister has issued guidelines limiting circumstances to the following broad categories:

- where legislation or policy produces unintended, anomalous, inequitable, unjust or otherwise unacceptable results in the particular circumstances
- where the matter is not covered by legislation or specific policy but it is intended to introduce such legislation or policy and, in the particular case, it is desirable to apply the benefits prospectively
- a loss has arisen directly from an alleged act or omission on the part of an Australian Government agency and the loss was not caused by the agency initiating processes that were consistent with its responsibilities.

Ex gratia payments

Ex gratia payments require approval by the government and are usually reflected in a specific appropriation. They usually take the form of payment schemes, which have guidelines and rules developed for a group of individuals suffering a particular class of losses.

Debt waiver and write-off

Write-off and waiver of debts are important measures for providing financial redress where debt has arisen as a result of administrative deficiency:

- most Australian government agencies have the power to write-off the recovery of debts in some circumstances (this does not 'extinguish' the debt and it may be recoverable later)
- the Finance Minister and his/her delegates have the authority to waive the Commonwealth's right to recover a debt in some circumstances (s 63 of the *Public Governance, Performance and Accountability Act 2013*).
- other agencies (e.g. Centrelink) administer legislation that provides for waiver of the recovery of a debt in certain circumstances.

Deciding not to investigate further—advising the complainant

Natural justice requires that we give complainants a right to be heard in relation to decisions that we make. Procedural fairness requires that we provide a full explanation of our decisions and an opportunity to respond to any evidence we have collected that does not support their position. We must ensure that we meet natural justice requirements when deciding not to investigate a matter further.

If you have reached a decision not to investigate further, either because you believe an appropriate remedy has been negotiated or because you do not consider further investigation is warranted (see Deciding not to investigate in section 2.5), you must inform the complainant of your intention not to investigate further, either verbally or in writing, and explain your reasons.

If you choose to verbally advise the complainant of your decision under s 12 to cease investigation, it is essential that you make clear that the investigation has ceased and the case will now be closed.

You must give the complainant an opportunity to disagree with your decision or ask you to consider further comments, additional details, evidence or arguments. If you are advising the complainant of your decision by phone, any disagreements will often come up in the course of the conversation. However if the complainant requests some time to consider the information and prepare a response, you should allow time for them to do so.

If you are advising the complainant of your decision in writing, you must allow a reasonable period for the complainant to respond to your letter before finalising the approach. Although the office has traditionally given complainants 28 days to respond to any information that we use to make our decision, a shorter time period might be more appropriate in some cases. For example, OSO complainants are given 14 days to comment on proposed s 12 decisions. Once the complainant has taken up that opportunity by responding to us we can take action to finalise the approach

Reconsideration

If the complainant responds, either by phone or in writing, assess the new information to decide whether it is substantive and may have an impact on the outcome of the investigation

or indeed, whether it should be treated as a new and separate complaint. If the new information does not change your decision to cease investigating, advise the complainant and inform the relevant agency of your decision by sending the s 12 notice. You should also inform the complainant at this time that they may request an internal review of this decision (see section 4.3 Internal reviews).

If, on the basis of the new information provided by the complainant, you decide that further investigation is warranted, advise the complainant accordingly and incorporate the new information into your further investigation.

You should also indicate in *Resolve* if the case is suitable for inclusion in the Annual Report or raises significant policy or systemic issues.

Deciding not to investigate further—advising the agency

Under s 12 you must inform the agency as soon as practicable of your decision to conclude the investigation. You may provide a s 12 notice to the relevant agency either verbally or in writing. This will depend on any contact protocols the office has in place with the agency. Where a s 12 notice to the agency is provided verbally, it is essential that you make clear the investigation has been concluded, and the case closed.

In some cases agencies may ask for additional information after receiving the s 12 notice. We can respond to such requests by giving the reason for discontinuing the investigation in general terms (for example, 'the complainant is satisfied with the further explanation provided', or 'we do not consider further investigation is warranted').

Section 12(4) comments

In some instances we might decide that further investigation is not warranted, but that it would be appropriate to make comments to the agency about its handling of the particular case or about a broader issue the complaint has highlighted. Section 12(4) of the Ombudsman Act allows the Ombudsman to 'furnish comments or suggestions' about any matter relating to or arising out of an investigation. Only officers at the EL2 level or above may make comments under s 12(4). For further information see section 3.3 Pursuing issues with an agency.

The use of s 12(4) comments, however, is not to be used as a mechanism for further investigation of a complaint.

Before you close the approach

Make sure that:

- all outstanding matters relating to the complaint have been resolved.
- the relevant Strategic Team has been notified of any systemic issues.

2.6 Quality Assurance

Our case management system (Resolve) prompts quality assurance (QA) opportunities during the period in which a complaint is being handled:

- Investigation plans are subject to review/sign off by an investigation officer's (IO's) supervisor;
- Initial contacts with agency (notices issued under s8) may be subject to clearance by an IO's supervisor before they are sent to an agency;

- Supervisors are notified when an IO seeks to escalate a complaint to a higher category;
- All Category 3 and higher complaints are referred to an IO's supervisor for a final QA before an agency is notified that an investigation is no longer being undertaken.

All new approaches which are registered by the Public Contact Team (PCT) and referred for assessment to an IO pass through a QA process managed by the PCT Manager to examine content and adherence to file management procedures. The PCT Manager and PCT Supervisor also review 10% of all approaches closed by PCT at the Category 1 or 2 level, as well as all approaches registered by new members of the PCT.

Apart from these inbuilt QA points, less formal QA opportunities arise through:

- Clearance of correspondence by an IO or Public Contact Officer's (PCO's) peers or supervisors;
- Examination of PCT registered approaches by Strategic areas;
- Regular meetings between IOs or PCOs and their supervisors that provide the opportunity for discussion of how complaint investigations are being progressed.

The process of internal reconsideration/reviews also provides an opportunity to undertake QA although this is post facto.

Our QA framework for complaint handling:

- is not intended to ensure that we make no mistakes, or to ensure that all work from the office is perfect;
- is intended to operate in the real world where mistakes happen and where the purpose of the process is to avoid serious mistakes, early detection and correction of small mistakes and identification of opportunities for improvement;
- must be seen as a normal part of our complaint handling work and recognised as designed primarily to continuously improve the way complaints are handled rather than a reflection of an individual's complaint handling abilities and performance;
- is attractive in that it affords scope for a supervisor to make some risk management decisions, for example, to undertake more intensive QA of the work of less experienced staff, to undertake more intensive QA of sensitive complaints prior to any external communication and to address resource constraints/facilitate staff development by arranging for more experienced staff to peer review some correspondence of less experienced staff.

Chapter 3—Complex and systemic issues

3.1 Further investigation and research

An investigation may require further research and analysis (for example, more closely studying any legal precedents, policy documents, or legislation) before a decision regarding an appropriate outcome can be determined.

When planning a complex investigation, you should determine what relevant resources you will need and whether they are available to you, including:

General

- Up-to-date legislation and case law (ComLaw and AustLII, and the ACT Legislation Register)
- agency websites
- related media releases/articles.

Internal precedent material

- information on similar existing or past investigations (including policy files and own motion investigations)
- past public reports (for example, own motion investigations)
- past Annual Report case studies
- legal opinions from the Legal Team
- case studies or guides from the relevant Strategic Team
- IOIs for current investigations.

External precedent material

- relevant court and tribunal decisions
- Parliamentary and ANAO Reports
- Investigations/reports from other scrutineers, eg Inspector-General of Taxation, ANAO.

Strategic Teams (agency specialists)

- may have a more detailed knowledge of the issues
- will be aware of any previous office investigation of similar issues
- will have access to relevant resources
- can provide technical and strategic advice on how to proceed with investigations.

Note: When a complaint is escalated to category 4, a *Resolve* notification is automatically generated and assigned to the relevant agency specialist. This informs the specialist that a more complex investigation is ongoing and will often prompt them to contact the IO to offer support or advice.

Research assistance

- *Resolve*'s administrator can help with more complex complaint management system searches.
- Your manager will also be able to offer advice regarding possible research directions.

Quick Checklist: Conducting further investigations

- Analyse the complaint and associated documentation to identify all relevant issues
- Prepare a detailed investigation plan
- Gather all relevant information and evidence related to the relevant issues—for example, copies of correspondence between complainant and agency officer(s)
- Consult with colleagues, managers and specialists as appropriate – see section 2.3
- Research relevant legislation, agency policies/procedures, legal precedents etc.
- Put issues to the agency – see section 2.4 *First contact*
- Analyse the agency's response – see *section 2.4 Evaluating the agency's response*
- Put further questions and issues to the complainant for response
- Communicate with the parties regularly in accordance with our service standards – see section 1.4
- Keep the manger/SAO informed of progress
- Ensure that significant correspondence is escalated for advice and/or signature
- If appropriate, develop suggestions for remedies and outcomes and develop strategies for communicating or negotiating these with complainants and agencies
- Record all actions, and incoming and outgoing documents in *Resolve*, as well as your investigation plan and analysis

3.2 Misconduct

If the Ombudsman considers there is evidence that a government officer has been guilty of a breach of duty or misconduct, the matter must be referred to the principal officer of the agency for appropriate action, according to s 8 (10) of the Ombudsman Act.

This provision also covers evidence of criminal conduct. In such circumstances the principal officer should be invited to refer the matter to the appropriate law enforcement agency, either State or Federal police.

Minor oversights or omissions generally do not fall into this category.

Approaches involving potential misconduct should be referred to the relevant SAO.

The Overseas Students Ombudsman and the Postal Industry Ombudsman may also notify of misconduct (s 19ZT and s 19Y of the Ombudsman Act respectively).

3.3 Pursuing issues with an agency

If investigation has established that there has been an error/s by the agency and a resolution cannot be reached in Category 3, the next step is to write to the agency to negotiate a remedy.

More complex issues are usually presented in writing to the agency's contact area or the Secretary/principal officer. In this case, it is recommended that you prepare an informal report accompanied by a covering letter addressed to the relevant agency officer. Note: all such letters are to be signed by the relevant Senior Assistant Ombudsman.

Any approach to an agency by letter at this stage usually involves either express or implied criticism of the agency or its staff. Letters should be worded carefully so that the conclusions drawn are tentative, not final. Present your arguments in a manner that clearly invites the agency's comments and response rather than demanding action.

This ensures that the office maintains good working relations with agencies and meets the requirements of s 8 (5) of the Ombudsman Act, which states that the Ombudsman shall not make a report about an investigation that is critical of an agency or person unless they have had the opportunity to make submissions on the issues.

Negotiation strategies

It is not always sufficient to put recommendations to an agency. You may also need to promote the remedy and explain the possible implications of not accepting our recommendations.

Explore an agency's reasons for refusing to accept conclusions and implement recommendations. Face-to-face talks are often useful for this purpose. The agency may be reluctant to accept recommendations for reasons other than the merits of the complaint. For example, it may want to protect its officers from criticism or be unwilling to set a precedent. Recommendations can often be modified to take these reasons into account.

3.4 Coercive powers

The Ombudsman has extensive formal powers to obtain information we believe is relevant to an investigation.

While coercive powers are not used very often they are an important tool, particularly where there is a dispute about the facts or where the agency is reluctant to provide information relevant to an investigation.

Coercive powers may also be appropriate where the investigation involves serious misconduct by an officer or where a person is reluctant to provide information voluntarily.

If coercive powers are required to resolve an approach, it should be escalated to Category 4.

The use of coercive powers can be a significant infringement on the liberties of an individual and the operations of an agency. For this reason, they should be used carefully and sparingly, and in strict accordance with the relevant Act and these guidelines.

We can, for example, obtain a file or policy documents from an agency or interview an individual under oath. We are able to override secrecy provisions in other legislation, the privilege against self-incrimination and official use of legal professional privilege.

Most of the coercive powers are delegated to EL2 staff and above. However, they are intrusive powers so the view of the Ombudsman or Deputy Ombudsman and the relevant SAO should always be sought before they are used and following consultation with:

- the Legal Team as to the form of the notice; and
- the relevant Strategic Team responsible for the agency complained about; or
- if we are seeking documents from a third party agency, the Strategic Team responsible for that third party agency.

Our formal investigation powers enable us to:

- require production of documents or other written records, s 9 (1) (delegated to EL2 and above)
- copy, take or retain documents, s 9 (1A) (delegated to EL2 and above)
- require attendance at a specified place and answer questions s 9 (2) (delegated to EL2 and above)
- examine witnesses on oath or affirmation, s 13 (delegated to EL1 and above)

- visit agency premises and inspect documents, s 14 (delegated to EL2 and above).

Similar provisions exist in the Ombudsman Act (ACT).

Exercising coercive powers without proper delegation is unlawful and constitutes a breach of the APS Code of Conduct.

Before using coercive powers, we must inform the Minister responsible for the agency concerned, in writing and signed by the Ombudsman, that the matter is being investigated. The responsible Minister for these purposes is the Minister of the agency that is the subject of the complaint.

The use of coercive powers must be recorded in *Resolve* and all related documentation stored on the formal file. A person affected by a decision to use a coercive power can request a statement of reasons for the decision under the AD(JR) Act. It is, therefore, essential that you properly record reasons for using this power and that all relevant evidence is examined before such a decision is made.

Quick checklist: When to use coercive powers

- If the person providing the information requires protection against defamation or other civil/criminal action for disclosing the information.
- If other restrictions prevent voluntary disclosure (e.g. where the agency advises that the document is subject to confidentiality provisions or legal professional privilege, although note that legislative changes in 2005 have meant that some fears held by agencies about voluntary disclosure can be allayed without the use of coercive powers.
- When the person/agency does not appear willing to provide the information or documents voluntarily.

Note: Giving false or misleading information is a serious matter under the Criminal Code.

Using coercive powers to access documents

Section 9 of the Ombudsman Act requires departmental officers and other persons to produce documents and information in accordance with a written notice served by the Ombudsman. Before taking this step, we are required under s 8 (7A) to reduce the complaint to writing if necessary and to inform the relevant Minister of the investigation. The relevant Minister for these purposes is the Minister of the agency against which the complaint has been made.

It is always preferable to obtain access to documents informally wherever possible and to pursue all other legitimate avenues before using coercive powers as a last resort. In most instances, it is not necessary to issue a notice under s 9. We can usually obtain the documents we need, particularly from Australian Government agencies, simply by explaining our role and function and our recourse to coercive powers. Offering to inspect the documents at the department's premises may also alleviate their concerns. We can also use other avenues to obtain the relevant documents without resorting to using coercive powers, for example, by recourse to copies of the documents held by the complainant and other parties.

As outlined above, you need to consult with senior management **before** issuing a written notice under s 9 of the Ombudsman Act.

Using coercive powers to conduct interviews

Section 9 of the Ombudsman Act also authorises us to require people to provide information by attending a formal interview. Before taking this step, we are required under s 8 (7A) to notify the relevant Minister. The relevant Minister for these purposes is the Minister of the agency against which the complaint has been made.

A notice is then issued to the individual concerned specifying the nature of the matter under investigation and the time and place of the interview.

The purpose of the interview is to obtain first-hand information about the issue. We do not make any finding at the time of the interview—the focus is on obtaining information from the individual.

Note: the Commonwealth Criminal Code provides substantial penalties for people who make false or misleading statements to officials and you should advise interviewees prior to the interview that giving false or misleading information is a serious offence.

Appointing authorised persons

The Ombudsman Act provides for the Ombudsman to appoint 'authorised persons' for the purposes of the Act. Authorised persons have the power to require the:

- attendance of a person
- production of documents
- answering of questions under oath.

This power provides the Ombudsman with the ability to obtain outside expertise, where, for example, some particular investigative or other experience or knowledge (such as a detailed knowledge of an organisation and its operations) is required.

A person who objects to the involvement of an authorised person in an interview can raise that objection, preferably before, or at least at the start of the interview. The Ombudsman Act makes it clear that it is our responsibility to determine how an investigation is conducted. Decisions to involve an authorised person from outside the office are made on the basis that such involvement is likely to contribute to the efficiency and effectiveness of the investigative process.

Providing reasonable notice

The Ombudsman Act and other legislation under which the Ombudsman operates do not specify how much notice an interviewee should receive when being compelled to attend an interview. However, give reasonable notice unless there is a strong reason not to. Generally, a minimum of four working days would be considered adequate. Only in unusual circumstances (e.g. where it is believed that evidence might be tampered with or documents destroyed) do we serve a notice requiring the attendance of the interviewee either immediately or within a short period of time.

Wherever possible, the timing of an interview should be arranged with the interviewee. If the interviewee has genuine difficulty in attending at the stated time, the IO can arrange an alternate interview time. The penalty provisions relating to non-attendance or the failure to provide information do not apply if the person has a reasonable excuse.

Serving notice of interviews

The legislation under which the Ombudsman operates does not prescribe the form of, or method of, serving a notice. Accordingly, a notice may be served in person, by post or by

fax. To ensure the privacy of the individual is not breached, if the notice is to be posted it should be forwarded to the interviewee's home address after informing the person that this is to take place. It is not appropriate to forward a notice to a member of the public's place of employment without their prior agreement. If the person is a Government official, arrangements for serving the notice may be made with the head of the agency.

The timing of the interview should be confirmed with the interviewee wherever possible. This is most important when a number of people are to be interviewed.

When a notice is served the interviewee should also be provided with a copy of the document *Information for Recipients of Notices Issued under s 9 of the Ombudsman Act*. This details interviewees' obligations and entitlements.

Third parties attending interviews

Persons being interviewed under the provisions of the Ombudsman Act and the ACT Ombudsman Act have no statutory right to have another person present with them during a formal interview, including a legal representative. Nevertheless, good practice and fairness suggest that a person subject to interview should be able to be accompanied by someone else—for example a union official, colleague or lawyer—unless there are good reasons to interview them alone (for example, concern about the communication of evidence to others). The third party is not a participant in the interview, and should not take any active part without the express consent of the officer conducting the interview.

Factors to be taken into account when considering this issue include:

- **The objective of the interview** — this is to obtain information first-hand from the person being interviewed. It is important that this objective is not compromised by the intervention of a third party. On this basis, attendance of a third party can only be for the purpose of providing a supporting presence for the person being interviewed and it is not appropriate for that party to speak for the officer or to object to questions. On the other hand, there is not generally any objection to reasonable consultation taking place between the person and the third party and the third party is generally permitted to make observations, usually at the end of the questioning.
- **Whether the matters to be canvassed relate to the personal affairs of another person** (for example, the complainant) —the Ombudsman may not be able to agree to the presence of a third party at an interview where the presence is sufficient to constitute a breach of another person's privacy.
- **The timing of the interview** —on rare occasions it may be necessary to interview a person with very little notice, in which case it may not be feasible to arrange a third party presence.

Requests to have a third party present should be considered on a case-by-case basis. Generally the Ombudsman's office will agree to such a presence if there is no privacy issue and provided the third party attends for the limited purposes set out above.

Witness expenses

Regulation 10 to the Ombudsman Act provide for the payment of a witness's expenses when that person is required to attend or appear as a witness before the Ombudsman or his delegate. A witness may be paid fees and allowances for expenses as determined by the Ombudsman (or his delegate) in accordance with the scale in Schedule 5.

As a general rule, reasonable witness expenses will be met upon request, on the basis that a witness should not be out of pocket simply because they have been compelled to attend for an interview or to produce documents.

Venue and format for conducting compulsory interviews

A compulsory interview is usually held in an interview or conference room at the Ombudsman's premises but may be held elsewhere if necessary or appropriate. Interviews should be conducted in private and in circumstances where there is little likelihood of being interrupted.

They are usually tape-recorded and a copy of the recording is made available to the interviewee as soon as possible. Where a transcript is made, a copy of the transcript is also made available to the interviewee. Ask the interviewee whether they agree to the interview being tape-recorded. Explain that this is to ensure we have an accurate record of the conversation and they will receive a copy of the interview. If they decline, provision should be made to take accurate notes.

While s 8 of the Ombudsman Act provides that the Ombudsman may conduct an investigation in such a manner as they think fit, best practice and the Public Service Code of Conduct require that questioning of witnesses be conducted in a professional manner. Witnesses should not be badgered or pressured by unfair questioning. They should be given every opportunity to explain their actions and provide details in response to questions.

Evidence under oath/affirmation

Depending on the circumstances, the interviewee may be sworn on oath or by affirmation before the interview starts. The oath may need to be varied for different religions—consult with the Legal Team for appropriate wording and arrangements.

However, before proceeding you should consider whether the interview is likely to be more successful with or without an oath or affirmation being given.

Wording for oaths and affirmations

Oath (to be sworn on the Bible or other Holy book):
I swear by Almighty God that the evidence I shall give to this investigation shall be the truth, the whole truth, and nothing but the truth.

Affirmation:
I do solemnly and sincerely declare and affirm that the evidence I shall give to this investigation shall be the truth, the whole truth, and nothing but the truth.

Protection of interviewees

Interviewees are often concerned that they may expose themselves to penalties if they disclose departmental information during a formal interview. The interview is compulsory, and the interviewee must attend and answer questions, so it is important to remind interviewees that provided their evidence is given in good faith, they are protected from civil proceedings (s 37 of the Ombudsman Act) and, with two notable exceptions, the evidence they provide is not admissible against them in court (s 9 (4)). In relation to criminal matters, the information or documents provided by a party is not admissible in evidence against the person in proceedings other than for proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code Act 1995*.

The exceptions to protection under the Act are:

- an application to the Federal Court where a person fails to attend, furnish information or documents, s 11A(2)
- proceedings for an offence under s 36 (for example, failing to attend, failing to answer questions)

- proceedings in relation to s 137.1, 137.2 or 149.1 of the Criminal Code Act.

Obligations of witnesses

Interviewees may not decline to answer questions or fail to produce documents when required to do so, on the basis that this would:

- contravene the provisions of any other enactment
- might tend to incriminate the person or make them liable to a penalty
- be contrary to the public interest.

However, information they provide (or the documents they produce) is not admissible in evidence against them, except for the exceptions listed above.

Using coercive powers—informing the Minister

The Ombudsman must inform the relevant Minister when proposing to issue a notice to obtain access to documents or require a person to answer questions under s 9 of the Act, unless the Minister has already been informed of the investigation (s 8 (7A)).

Section 9(9) of the ACT Ombudsman Act has a similar effect. For an ACT community policing matter the ACT Attorney-General should be provided with a copy of a letter to the Australian Government Minister.

To ensure accountability in the use of coercive powers, this advice to the Minister needs to be reasonably detailed, with enough information to enable them to assess whether to seek a briefing, including:

- the identity of the complainant if appropriate and/or relevant
- a description of the action under investigation
- a general summary of the claims or allegations.

Template letters for the use of coercive powers can be found on the intranet.

3.6 Systemic and significant issues

What is a systemic or significant issue?

A systemic issue can include:

- a pattern of agency conduct, or recurring instances of agency conduct, that could warrant comments being made under s 12(4) of the Ombudsman Act—for example, persistent delay in meeting a statutory timeframe, poor complaint handling, or defective notification letters
- a deficiency in an individual case that is likely to be repeated in other cases—for example, an erroneous interpretation of legislation, wrong advice in an agency manual, or an error by an individual officer that reflects poor training.

Where a complainant has been to an agency and a problem is reasonably straightforward but the agency has not dealt with the problem, this in itself is a matter that is potentially suitable for a systemic review or for broader comment. This is particularly the case in agencies that have effective internal complaint handling. For example, where the ATO or the Department of Human Services has processed a complaint through its internal complaint mechanisms and has not picked up an obvious problem, it should be addressed as a systemic or broader issue with the agency.

A systemic issue is by nature a significant issue. Other issues can be significant though not necessarily systemic—for example, the wrongful arrest or detention of a person; or physical damage to private property caused by negligent agency action.

If you identify a systemic issue you need to consider the options set out in this section. The same can apply to a significant issue that either warrants special attention or that may have broader ramifications.

For convenience, the following discussion will refer only to systemic issues.

Does this matter warrant further action?

The foremost question to be asked in respect of any systemic issue is whether it warrants special investigation or further action. The ultimate step is an issues paper or own motion report, but there are many other options listed below. As a general guide, a systemic issue is more likely to be the subject of further investigation or action if one of the following factors is present:

- the systemic problem has given rise to numerous and ongoing complaints
- the systemic problem has or is apt to cause appreciable damage or inconvenience to members of the public
- the agency in question has not acted to address the systemic problem
- the systemic problem is complex and could be better understood or resolved by further investigation
- the same systemic problem could arise in other areas of government administration, or should as a precautionary matter be brought to the attention of other agencies
- there is a broader public interest in highlighting or publicising the systemic problem.

If you identify a possible systemic issue, this should be recorded as 'issue of interest' in *Resolve*. See Issue of Interest Reference Guide. This allows Strategic Teams to be approve, be aware of, and monitor systemic issues.

Options for further action

The office maintains a central 'issues of interest' functionality which allows staff to identify possible systemic issues, prioritise them, record how the issue will be dealt with and who has responsibility for following up.

If a potentially systemic issue is identified, there is a range of options to be considered, including:

- undertaking further monitoring of the issue either through complaint investigations, other inspection work or in the course of other forums (such as meetings) with the agency concerned
- checking *Resolve's* issues of interest functionality to identify whether the issue has previously been identified, or whether there are similar issues in other agencies or jurisdictions
- drafting a s12 (4) comment or suggestion
- drafting a letter to the agency to raise the issue and seek further information, signed by a SAO
- requesting a briefing from the agency on the specific issue
- drafting an issues paper which might include highlighting the issue, providing examples through case studies and making suggestions or recommendations for addressing the problem

- including the issue in a quarterly report from the Ombudsman to the head of the agency
- reporting on the issue in our annual report
- conducting an own motion investigation
- preparing a formal report under s 15
- issuing a press release
- reporting on the issue on our website.

It may also be useful to prepare an *assessment of systemic issues paper,* which:

- sets out the issue, relevant complaints, policy or legislative considerations, assessment and options for progressing and resolving the matter
- can be used to inform the team, branch or Executive on a particular issue or to seek approval for a particular approach
- is a record of the action taken to consider the issue and may be built on in future if more information comes to light
- is a tool for communicating systemic issues across the office.

Recording and monitoring issues of interest

Where an investigation identifies an issue that is systemic or otherwise of broader interest, it is usually appropriate to consider formally recording this as an 'issue of interest' in *Resolve*. This allows the office to centrally track any comments or recommendations made to agencies, and to monitor resulting outcomes. [insert link to IOI procedure document]. Strategic Teams should first be consulted in relation to issues relating to agencies which they oversight.

Making comments under s 12(4) of the Act

Section 12(4) of the Ombudsman Act allows the Ombudsman to make comments or suggestions about any matter relating to or arising from an investigation. Our office uses s 12(4) comments to highlight issues of concern in an individual case or on a broader issue and, in most instances, to suggest a possible remedy or other course of action. Only officers at the EL2 level and above are authorised to make comments under s 12(4).

Issues paper

An issues paper should be considered in the following circumstances:

- an important issue has been identified that does not (at this stage at least) warrant a s 15 report; an issues paper will provide the agency with an opportunity to address the issue ahead of any more formal action being taken by the Ombudsman
- a noteworthy problem has been identified that has not been fully investigated, yet warrants being raised at this early stage with the agency with a view either to remedial action being taken or the issue being further clarified without the need for a more extended investigation; an issues paper can be an effective means of bringing an issue to the attention of senior management in an agency
- as a style matter, it seems better to raise a complex issue with an agency in an attachment to a letter rather than in the body of a letter.

An issues paper can be presented in a variety of forms—it may be short or long; it may be described as an issues paper, or it may bear another title; it may describe a problem, with or without case studies; it may ask questions, or set out suggestions or recommendations for the agency to consider; it may conclude an investigation, or it may be a precursor to a s 15 report in the event that an agency does not respond satisfactorily. The issues paper can result from an investigation but this is not always the case.

As with own motion investigations and s 15 reports, an issues paper needs to be presented to and approved by the Strategic Policy Board. Information about preparing information for Strategic Policy Board is available on the intranet.

Note that if the issues paper asks questions that may result in an agency providing personal information about its clients or customers etc then we should ensure that there is an open relevant complaint or an own motion underway as otherwise, the protections afforded under s 8 of the Ombudsman Act will not have been afforded.

The main point about an issues paper is that it is a stand-alone document that is designed for a strategic purpose. The purpose is to frame an issue, usually with an eye to a focused dialogue with senior officers of an agency in order to improve the agency's systems or processes.

Formal section 15 report

Three considerations govern whether a s 15 report is warranted:

- An investigation has identified administrative deficiency by an agency of a kind listed in s 15 of the Act—that is, administrative action that was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, otherwise wrong or unsupported by the facts, involved a failure to give reasons for decision, or was based on a law or policy that was unreasonable, unjust, oppressive or improperly discriminatory.
- The power to issue a s 15 report is a non-delegable power of the Ombudsman. Consequently, the administrative deficiency must be of a nature that is serious enough to warrant a formal expression of opinion by the Ombudsman.
- The practice of the office is to publish all s 15 reports, either in full or in an abridged form. The issue dealt with in the report must therefore be significant enough to warrant a formal published report. Section 15 of itself does not enable public release of the report. Rather, this is a separate consideration under s 35A. If the Ombudsman decides to publicly release it then there should be a note on the *Resolve* record and in the covering letter to the agency that the Ombudsman considers publication appropriate in the public interest.

Most s 15 reports have arisen from own motion investigations into systemic issues. It has been common also to prepare a s 15 report if there have been numerous complaints on a related topic that can usefully be brought together in a single report to highlight a problem area in agency administration. In a few instances, a s 15 report has been made to culminate an individual investigation, usually where an issue is a matter of public notoriety or an agency has not accepted a recommendation of the Ombudsman on an important issue.
A proposed s 15 report needs to be presented to and approved by the Strategic Policy Board (SPB). Information about preparing information for Strategic Policy Board is available on the SPB intranet page.

There are strict procedural controls on the preparation of s 15 reports. The s 15 report should be prepared in accordance with the Office's report templates and in accordance with SPB process. A draft of the s 15 report must be provided to an agency for comment before it is finalised, as required by s 8 (5) of the Act.

Own motion investigation

An own motion investigation is initiated under s 5(1)(b) of the Act which states that the Ombudsman may, of his or her own motion, investigate any action relating to a matter of administration by a Department or prescribed authority. Along with investigating complaints, the office also has a role in improving public administration. We have a responsibility to

identify systemic issues in the course of our work that need to be investigated and to make recommendations to agencies about how such issues can be addressed. The own motion capacity provides a vehicle for this role.

A proposed own motion investigation needs to be presented to and approved by the Strategic Policy Board (SPB). Information about preparing information for Strategic Policy Board is available on the SPB intranet page.

This reflects the need to ensure that the office directs its resources to areas of high priority and that it does not unduly burden agencies or individuals.

An own motion investigation may have several results.

- The investigation may assure us that there is no issue of substance, and the investigation will be terminated without a report or paper.
- The investigation may raise issues that warrant less formal exploration with the agency or agencies (at least in the first instance) resulting in an issues paper.
- A report under s 15, which generally includes recommendations to the agency.

The section on own motion investigations (section 3.8 Own motion investigations) addresses the legislative requirements and procedural guidance separately.

Selecting the most appropriate course of action

The purpose of pursuing a potentially systemic issue is to raise and resolve the issue with the agency in the most effective manner. When deciding the best way to do this, not only do you need to take account of the factors set out below, but you should also consult with the relevant Strategic Team so that there can be agreement to the most appropriate course of action.

What outcome are you seeking?
Tailor your course of action to the intended outcome.

How urgent is the matter?
If it is urgent, consider drafting an email to the agency contact, drafting a letter to the agency head or arranging a meeting.

What is the scope of the matter?
If the matter is confined or focused, you may wish to take a more informal approach. If the matter is broad, or is an issue affecting a number of agencies, you may wish to consider a more formal approach such as an own motion investigation. You should consider whether the own motion investigation should be confined to one agency or whether it would be more appropriate to expand the scope of the investigation to include a number of agencies.

What is the nature of the relationship with the agency?
If a cooperative relationship exists, informal means may be adopted to achieve the intended outcomes, such as a meeting or a letter to the head of the agency.

What was the agency's previous response to this or other similar matters?
If the agency is recalcitrant, consider using more formal mechanisms, such as conducting an own motion investigation and issuing a s15 report.

What is the impact or consequence of the matter?
Are there a number of related complaints?
Are they limited to one agency or are they common across other jurisdictions?

Are there any intermediate solutions or steps that the agency could take to assist in resolving the matter?

What are the resource limitations?

Are there cross agency issues or cross jurisdiction issues?
For example, reasons for decisions, use of interpreters, correspondence or procedural fairness issues.

Is the agency implementing change?
If so, we may decide to monitor rather than investigate. This would involve identifying an appropriate timeframe for change to occur and a plan as to how the office will determine whether it has been successful in addressing the issue.

Whatever course of action you choose, it is important that you clearly identify the scope and issues, link the matter to complaints and define the intended outcomes. This can be achieved in an *assessment of systemic issues paper*.

Follow up

It is important to remember that the publication of a report or receipt of a response from an agency is not the end of the matter. You should monitor the implementation of any proposed solutions by the agency and test their effectiveness. The Strategic Policy Board will seek updates regarding the implementation and outcome of reports.

Depending on the significance of the issue and compliance by the agency, follow up can be conducted by:

- requesting follow-up reports at appropriate intervals—it is also important that appropriate action is taken when these reports are received, for example, we should consider whether the issue has been resolved, whether we are satisfied with the agency's action and whether further comment is warranted
- monitoring incoming complaints
- arranging meetings with the agency to discuss the implementation of the recommendations
- telephone liaison
- correspondence to the agency from SAO/Deputy Ombudsman/Ombudsman.

Monitoring compliance by the agency may involve:

- monitoring new approaches in relation to the issues addressed in the report
- assessing the impact of implementation of the recommendations
- monitoring media reports
- requesting a briefing from the agency on the progress of implementation of recommendations
- creating a log that assists with tracking the implementation of recommendations.

Identifying and investigating systemic issues

IOs should identify systemic problems in administration, policy or procedures that become apparent while investigating complaints. Systemic problems are generally beyond the scope of an individual complaint and may require that an agency change its policies, legislation, procedures or practices. They usually affect more than one individual.

Identifying systemic issues

The Ombudsman's office maintains an 'Issues of Interest' (IOI) functionality on *Resolve*, which allows staff to centrally record and monitor systemic and other significant issues. Upon identifying a possible systemic issue staff should always check the IOI in the first instance, as it may be more appropriate to record the details against an existing issue rather than creating a new one.

If an IO identifies a possible systemic issue that does not appear in the IOI, they should discuss it with their supervisor or Director. If supported, the IO should take steps to propose that a new issue be registered in the IOI. (Care should be taken with cases involving PIO complaints due to the fee structure associated with that jurisdiction.) Details of how to search for existing IOIs and submit new ones for consideration can be found in the Issue of Interest Reference Guide.

The relevant specialist will then consider the proposed issue and provide feedback to the IO.

Investigating systemic issues

Some systemic issues are complex and pursuing them involves considerable resources. Some may need to be pursued as a special project or an own motion investigation. As a result, all systemic issues have to be considered against the office's current strategic priorities and proposed projects, as well as available resources, to determine whether they should be pursued and in what time frame.

Some systemic issues may be investigated as part of the investigation into an individual complaint, for example in some cases where a deficiency is identified.

The question of whether a systemic issue should be investigated may depend on:

- the level of seriousness/urgency of the matter
- whether the matter concerns a priority issue or agency
- the likely impact of the allegations/investigation in terms of the number of people affected or financial amounts involved
- whether the issue is common across a number of agencies
- whether another agency or oversight body could more appropriately handle the investigation.

When pursuing a systemic issue, the relevant Strategic Team should consider pursuing the matter by way of the case investigation (in conjunction with the IO, or involving the IO(s) who originally brought the matter to their attention). This gives the IO an opportunity to expand their skills and work with other teams. An IO should only be invited to contribute to such a project with the agreement of their supervisor. In any event the IO should receive feedback on the ultimate outcome.

Identifying approaches for inclusion in the annual report

The Commonwealth and ACT Ombudsman's annual report provides an overview of the key activities and achievements of the office. They provide a snapshot of complaint investigation in the preceding year and are important accountability mechanisms for our office.

During the course of an investigation you may decide that the approach would make a good case study for the annual report or e-bulletin because it falls into one of the following categories:

- approaches for which a good outcome or specific type of remedy was achieved—for example where innovative solutions to a problem have been identified, or where agencies have gone out of their way to solve a problem
- approaches where a systemic issue or oversight within an agency was identified—especially those that have resulted in follow-up action by our office
- approaches that have led to an improvement in public administration as a result of a change in policy or procedure
- approaches that illustrate important issues in public administration
- approaches for which a deficiency was identified—including any recommendations made by our office and whether the agency acted upon them.

Identifying approaches

Approaches can be flagged for inclusion in the annual report by choosing the 'Possible case study' action within *Resolve*. This will generate an open action to the agency specialist. In this action you should briefly explain why you think that the case may be suitable for inclusion in the annual report.

Within the action, the agency specialist will either 'Agree' or 'Disagree' that the approach should be a case study. A 'Possible case study – Specialist comments' action will then be generated, completed by the specialist and assigned to the IO. In this action the specialist will briefly outline why they agree or disagree with the IO's suggestion. The agency specialist should complete this action within three days.

3.7 Considering the agency's response to our findings and suggestions

If the agency responds positively and accepts our findings and suggested remedial actions, then the complainant and the agency should be informed of the outcome and the investigation finalised.

However, if the agency does not agree to all of our suggestions, then a decision will have to be made as to what further action, if any, is appropriate:

- **No further investigation**—assess the likelihood of success if the matter is pursued further. If the major issues have been addressed and further investigation is unlikely to convince the agency to take further action, it may be more appropriate not to investigate further. In some cases, it may be possible to pursue the remaining issues at a later stage, in a different way (for example, the agency specialist raising systemic issues through a project or issues paper).
- **Arrange a face to face meeting with the agency** – to discuss our suggestions and their response
- **Consider the possibility of working with other scrutineer agencies on the issue** eg the Inspector-General of Taxation
- **Restructure the suggestions**—consider if certain aspects, components or the wording of suggestions are causing the agency concern. Assess the viability of amending the recommendations to make them more acceptable.
- **Formal report**—if the matter is significant and an appropriate outcome cannot be negotiated with the agency, consideration should be given to presenting the matter to the Strategic Policy Board as a possible report under s 15 of the Ombudsman Act.

3.8 Own motion investigations

Section 5 (1)(b) of the *Ombudsman Act 1976* gives the Ombudsman authority 'by his or her own motion, [to] investigate any action, being action that relates to a matter of administration, taken ... by a department or by a prescribed authority'.

There are eight key phases that should be addressed when undertaking an own motion investigation:

Phase 1 – Identify the need for an investigation

Once you have taken into account the appropriate considerations and decided that an own motion investigation should be conducted, proceed to Phase 2.

Phase 2 – Conduct some preliminary research

Conduct some preliminary research before you develop your project plan.

- Has the office previously considered the issue?
- Has the issue been addressed in any other forum?
- Has the agency indicated that it has commenced action to resolve the problem?
- Are there any other changes planned, such as legislative changes, which may affect the scope or relevance of the project?

You should also discuss the matter with your supervisor and relevant internal stakeholders, including agency specialists and SAOs.

This process will enable you to assess previous work completed, incorporate different perspectives, raise awareness of potential challenges, evaluate the priorities of the office and refine the scope of the project.

During phase two, preliminary research of a proposed own motion investigation should be recorded on a non-approach file.

Depending on the nature of the problem identified, the time taken in this phase may vary. However, this is a critical phase in determining the scope of the investigation. For example, it may be time consuming if you have identified cross-agency or multiple issues.

Phase 3 – Present to the Strategic Policy Board

If you think that the matter should be considered further, you must seek the Strategic Policy Board’s approval to conduct the investigation.

The factors the Strategic Policy Board’s will consider when deciding whether or not to approve the proposed project may include:

- whether the allocation of resources can be justified against the likely benefits of the project
- the significance of the issues in relation to public administration
- the number of people affected
- the resource implications for the Ombudsman's office (staff time and costs outlaid)
- the resource implications for the agencies involved
- the urgency of the investigation
- competing priorities within the Office
- the legislative and policy settings of government

- whether another agency could more appropriately handle the investigation, alone or in cooperation with the Office
- whether the systemic issue could be more appropriately dealt with via other means (for example, by an issues paper or letter to the agency)
- whether the scope of the proposed investigation is appropriate and manageable.

Phase 4 – Steps to take if your project is approved

Advise staff

It is important that staff are aware of own motion projects on foot. Notification might occur by:

- adding an Issue of Interest on *Resolve*, or updating an existing IOI
- including information on the specialist's intranet page
- posting an intranet news item
- discussing the project during information sessions or briefings between operations and strategic teams.

Form a project team

If a project team is required, remember there may be staff outside your immediate work area with skills that will be useful to the project. There are a broad range of skills and experience across the office from which to draw. Register the project in Protecht, and add any report to the Register of all Office reports (A1678552).

Consultation

Internal consultation is a useful part of the investigative process and can involve:

- agency specialists
- other investigation staff
- Intake Team
- IT Team
- *Resolve* Administrator/Business Analyst.

Notify the agency

Under s 8 of the Act, the Ombudsman or his delegate must inform the agency of the decision to investigate. As with general investigations, you must fulfil this statutory requirement for own motion investigations.

Research

The following sources may be useful:

- internet/legal databases (ComLaw, AustLII)
- academic/government publications
- historical and current cases
- *Resolve* searches and reports
- earlier office publications, including publicly released investigation reports and annual reports
- briefing from the relevant agency.

Your external consultation may also extend to external complaint-handling bodies, service providers/recipients and advocacy groups.

You should create file notes or minutes of relevant discussions for the file and record information sources so that you can reference them in the report.

Conducting interviews and gathering documents

Consider whether conducting formal interviews would assist in gathering evidence for your project. If it is necessary to invoke formal powers under s 9 of the Act (see section 3.4 Coercive powers) then a written notice must be given to the agency.

Progress reports to the Strategic Policy Board

Progress reports against key milestones must be regularly provided to the Executive through the responsible SAO. The frequency of updates will depend on the complexity of the matter and will be determined by the SPB when the investigation is approved. Updates should also be made to the Register of all reports.

Phase 5 – Analyse the data

Once you have gathered the necessary data, a process of analysis must follow. This includes:

- assessing whether the information gathered is consistent with your investigation plan and adequately addresses the issues and questions you have identified
- determining whether there are any gaps in the information you have
- determining whether there have been any changes in legislation, policy or procedure that have had or will have an impact on part or all of the investigation
- assessing whether enough information has been obtained to make reasonable conclusions about the issues
- forming preliminary views and draft recommendations
- deciding whether any issues ought to be put to the agency for clarification
- canvassing and testing preliminary views and draft recommendations with key internal stakeholders, and consulting with your supervisor, Director, and SAO.

Phase 6 – Draft report

Report format

All reports should be written as though they will be publicly released. They should be logical and well structured. It is important that we provide a full account of our investigative process and reasons for decisions. We must clearly articulate the evidence on which we base our conclusions. Please refer to the Guidelines for preparing own motion and major investigation reports for publication and Quick checklist: basic structure of formal reports for guidance on producing a well-written report including length, style, structure, language, tone and media requirements.

Recommendations

Recommendations should be specific, concise, realistic, achievable and consistent with the office's purpose of assisting government agencies to improve public administration. They should enable the agency to improve performance and/or achieve compliance. Any final conclusion or recommendation should be that of the Ombudsman, for example 'the Ombudsman is of the view' or 'I recommend'.

It is a requirement that a 'Glasshouse' report is prepared each time this Office makes any recommendation(s) to an agency. A Glasshouse report's purpose is to ensure we consider

whether the standards we set for agencies also applys to this Office. The SPB intranet page provides a template for preparing a Glasshouse report.

Circulate internally

Circulate the draft report internally for comment. Seek comments from staff who have had input into the project and staff whose work it may affect. Consult with the Communications Team to develop a media strategy for the Ombudsman's consideration.

Submit to the Executive

Once you have finalised the draft report, obtain approval through your supervisor, Director and SAO with an accompanying *Information Paper* and Formal Report Checklist.

The SAO will then submit the document to the Strategic Policy Board for consideration.

To facilitate the consideration of your draft report by the Executive, you should provide and keep an annotated or footnoted draft on file, which refers to relevant source material, names and *Resolve* numbers until the final document is approved.

Do not circulate drafts externally prior to obtaining Executive approval.

Provide a s 8 (5) opportunity

Before a s 15 report can be finalised, s 8 (5) of the Act requires the Ombudsman to give the agency or an individual an opportunity to comment. A s 8(5) opportunity is usually provided by drafting a letter for the Ombudsman's signature, addressed to the agency head, enclosing the draft report so that the recipient can understand what was investigated and the basis for any possible criticism. When providing an individual with the opportunity to comment, it is general practice to provide only the section(s) relevant to that individual and not the whole report.

If both an individual officer and the officer's agency need an opportunity to comment, consider providing an opportunity to the officer first. (For this reason, when conducting interviews, IOs should also ask interviewees their preferred contact address so that they can send a draft to the interviewee without alerting the agency to that process. If the agency becomes aware that we are offering a s8(5) opportunity to an officer then the agency may necessarily assume that the draft is critical of that officer.) After the officer's response is received and analysed, the draft may no longer be critical of that officer.

Depending on the complexity of the report, we would normally expect an agency or individual to respond within 28 days, unless an alternative timeframe is negotiated between the office and the agency or individual. If the agency agrees with the content of the draft report, it can be finalised.

If the individual or agency disagrees with the content of the draft report, you may need to re-evaluate the issues in contention. Any reconsideration of these issues must involve the relevant SAO and the Executive as they have signed off on the draft. A process of negotiation over the content of the draft report may follow. However, decisions about the content of an s 15 report ultimately lies with this office. To facilitate the process and to ensure that the report accurately explains the issues, it may be beneficial to have a meeting with the agency soon after the draft report has been provided to it. This will allow for a more open discussion of the facts, issues and recommendations.

The individual or agency response is normally incorporated into the final report.

Phase 7 – Finalise investigation

If at the conclusion of the investigation you decide not to investigate the matter further, you must inform the agency of your decision and the reasons for it under s 12 (1) of the Act. You must also inform the complainant if the investigation relates to an open complaint.

When you have finalised your report, submit it to the Corporate Strategy and Communications Team who will edit and format the report to comply with office standards, arrange for printing (if this is to occur), and coordinate a media and distribution strategy (if required) with the Ombudsman and officer(s) responsible for the report. All reports released publicly are listed on the Commonwealth, ACT, OSO or PIO website. You should make a recommendation to the Deputy Ombudsman and Ombudsman about whether the full report, an abridged version or a single page summary should be made available online.

If the report is likely to be of general interest to the public or to other agencies, it is customary to print the report and to issue a press release at the time of publication. The draft press release and the proposed date of publication should be notified to the agency. It is not usual to print the report or issue a press release if the report deals with an individual case, is published in an abridged form, or is not likely to excite media interest.

Following the release of a major report, the project coordinator is encouraged to conduct a lunchtime seminar for staff to highlight issues in the report and lessons learned in conducting the investigation and developing the report.

Phase 8 – Follow up

The project coordinator's responsibility does not end on publication of a report. We should pursue the implementation of all recommendations to which the agency agrees. See the 'Follow up' section in *Systemic and significant issues* for suggested methods of follow-up. Any recommendations made that also apply to this Office are to be followed up as part of the Glasshouse work.

A Register of all recommendations is maintained by the SPB Secretariat. This allows SPB to track how agencies are implementing the recommendations made, and also for the Office to track how the Glasshouse standards we have adopted are being met. SPB will require updating on the implementation of recommendations through the relevant SAO. The frequency of reports will depend on the complexity of the matter and an assessment of what would constitute a reasonable period for compliance. The Strategic Policy Board will provide guidance on their expectations when clearing the report. We would generally seek to provide a summary of the implementation of the recommendations in an annual report that year or the following year, depending on timing.

If you are not satisfied with the implementation of the recommendations, further steps should be taken to consider an appropriate response if one is considered necessary. These include:

- meeting with the agency at SAO/Deputy Ombudsman level
- correspondence from the Ombudsman to the agency head
- preparing a follow up report
- progressing to a public report/own motion investigation/report to Parliament.

Own motion investigation—legislative requirements

Legislative requirement under *Ombudsman Act 1976*	**Legislative reference**
Decision to conduct an own motion investigation	**s 5(1)(b)**
• A decision must be made under s 5(1)(b) of the Act before the own motion investigation can commence.	
Notify the agency	**s 8**
• You must inform the agency of the decision to investigate. A s 8 notification is also sent to the Minister responsible for the agency.	
Provide an opportunity to comment—agency	**s 8 (5)**
• Before a s 15 report can be finalised, the Ombudsman must comply with s 8 (5) of the Act, which establishes the requirement for procedural fairness. To do this, we must: • Inform the Minister of the investigation. • Invite the agency head to 'appear ... and make submissions, orally or in writing' in relation to the action. Simply asking for comments and/or responses does not satisfy the substantive requirement to provide an opportunity to appear and make submissions. • Provide advance notice of the criticism in the draft report at the time we invite the person/agency to appear and make submissions (Chairperson, ATSIC v Commonwealth Ombudsman (1995) 134 ALR 238). • The letter forwarding the draft report to the agency should indicate whether it is the Ombudsman's interim intention to publish the report in full or in an abridged form.	
Provide an opportunity to comment—individual	**s 8 (5)**
• Where we criticise an individual within an agency and there is a risk of serious damage to a person's reputation by providing the untested views to the agency, there are three options: • Provide a s 8 (5) opportunity to the officer before providing a s 8(5) opportunity to the agency. • Provide a non-s 8 (5) (informal) procedural fairness opportunity to the officer and then, if the criticism is likely to be maintained, provide the officer and the agency with a s 8(5) opportunity. The form of the non-s 8(5) (informal) process could vary, having regard to the facts and the gravity of the matter. • Where there are reasons to do so (for example where the matter is urgent), provide simultaneous s 8 (5) opportunities to the individual and the agency, but expressly assert to the agency that the criticism of the officer is tentative and that it may be changed or removed.	
Conducting interviews and gathering documents	**s 9**
• If you need to formally conduct interviews and gather documents under s 9 of the Act, then a written notice must be provided to the agency.	
Section 15 report	**s 15, 16 and 17**
• Issuing a s 15 report is one of the most significant steps the Ombudsman may take. The power to issue a report to an agency under s 15 is held by the Ombudsman and is not capable of being delegated. Therefore, the Ombudsman must sign all s 15 reports.	

Legislative requirement under *Ombudsman Act 1976 (continued)*	**Legislative reference**
Releasing report to the public	**s 35A**
• A decision to release a report to the public is made under s 35A of the Act which provides that the Ombudsman or his delegate may publicly disclose investigation information if he considers it in the interests of a person, an agency or the public. It is not inevitable that a s 15 report will be published, though to the extent possible they are released either in full or in an abridged form.	
Releasing report to the complainant	**s 12 (3)**
• A decision also has to be made whether to release the full report to the complainant (if there is one involved in the own motion), in accordance with the duty of the office under s12 (3) to furnish the particulars of an investigation to the complainant. The office cannot control the use or circulation of a report by a complainant. The agency should therefore be advised if a full report is being provided to a complainant, even if the office is not publishing the report.	
Finalising the investigation	**s 12 (1)**
• If at the conclusion of the investigation you decide not to investigate the matter further, you must inform the agency of your decision and the reasons for it under s 12 (1) of the Act. You must also inform the complainant if the investigation relates to an open complaint.	

Quick checklist: Basic structure of formal reports

Basic structure of formal reports

Formal reports should comply with our style and presentation guidelines. While there is no set format the following structure is generally appropriate:

- complaint
- background
- investigation
- issues
- conclusions.

Lengthy reports should start with an Executive Summary setting out the background and conclusions.

Obligations under s 8 (5)

The statutory right under s 8 (5) of the Ombudsman Act allows people and agencies who are criticised the choice of making an oral or written submission before we proceed with a formal report under s 15. Some issues for IOs to consider in undertaking the s 8(5) process include:

- **WHO you need to contact:**

  Does the draft report contain implied or actual criticism of individual agency officers? If yes, you will need to provide a s 8 (5) opportunity to appear or make submissions. Can you identify who these people are and where they work/ed?

- **WHAT you need to do:**

  Go through the draft report carefully to prepare the extracts relevant to that person and only that person (delete critical references to the actions of other people or the agency).

- **WHAT you should include:**

  You only have to provide those extracts that are critical of the person/organisation. However, you may choose to include other extracts as context. If there are more than a few paragraphs in total, you should provide the extracts in a schedule attached to the letter. If the schedule is long you may wish to highlight those paragraphs that contain the criticism (compared with those included for context and information only).

- **HOW will you contact these people?**

  Have you interviewed them and therefore already have their current contact details? If not, do you know how you can get in contact with them? It is recommended that you try to contact people by telephone anonymously first. This could include using the agency's switchboard number and asking to be connected to the individual without identifying from where you are calling. Once you are connected to the individual you can explain that you need to send them extracts from a draft Ombudsman report and ask them how they would prefer to receive the letter – by post, fax, email? Note that some officers may be on leave, have left the organisation altogether or be overseas and be unable to be contacted. If this is the case you need to take steps to show you made a reasonable effort to try to contact them. This may include requesting forwarding address details from the agency—discuss privacy considerations with the Legal Team first.

- **HOW long does the process take?**

  It depends on the number of people who need to be provided with an opportunity to comment and how difficult it is to identify and extract the criticisms in the draft report. You should allow at least a few days to prepare the extracts. If you do not have contact details this step could take a week or more, particularly if you are relying on the agency to provide them. Once you write to the individuals you need to allow 14 days for their response plus postage if sent by post. It is recommended you use registered post to ensure only the individual concerned receives the letter. If you are able to speak to the individual first, ask them what their preferred mode of delivery is and use this.

- **WHAT happens next?**

  The individuals concerned may contact our office with questions. You need to decide in advance who will handle these queries – usually this would be the IO. Individuals may chose not to respond; to respond with comments in writing or request to appear in person to make a submission. In the latter case, you will need to determine who they will appear before (for example, the SAO, or responsible EL2). This might depend on the level of seniority of the individual in the agency. For example, if the individual is SES Band 2 or 3 it may be appropriate to involve the DO. Whoever it is, you need to make sure they are readily available during the 14 day 'opportunity to comment' period to receive any individuals who wish to appear to make a submission in person. You will also need to book an office or meeting room for this purpose. Some individuals or organisations may request an extension of time. Determine in advance whether extensions will be granted—under what circumstances and for how long?

- **WHAT do you do with all the comments?**

  You need to consider all the comments and take them into account in the final draft report, which will then go the agency for comment. One way to do this is to create a table showing the paragraph number of the extract; the person's response; your analysis of the response and; whether you will make any changes to the draft report as a result or not. Note that it is possible that new information may emerge through this process that you were not aware of previously. This may mean you need to undertake further investigations (for example, requesting documents you now know exist) to determine whether to change sections of the draft report and, if so, how. If this happens, you will need to allow more time to finalise the process and the draft report. However, our office has the right to decide when to finalise the process and to form our final preliminary views, even if these conflict with the opinions of some of the individuals. In this case, one option is to note the opposing views in a footnote at relevant points in the report or to note the reason for not making a change in the table of analysis.

- **AFTER** you have made all the changes, you will need to submit the final draft report to the SAO, Deputy Ombudsman and Ombudsman for consideration. Once the Ombudsman has provided his clearance, a copy should be sent to the agency head for the agency to comment, using the template letter. The agency is normally given 28 days from the date of the letter to provide any comments. This letter should state whether the Ombudsman intends to publish the report, in full or in an abridged form, and invite the agency to comment on this proposal.

- At this point you may also chose to write to the individuals who commented and advise them that the report is now with the agency for comment. Alternatively, you may write to them just before the report is published to alert them to this fact.

- Then follow the normal steps of sending the report to the Corporate Strategy and Communications Team for editing and printing (if hard copies are to be produced). Draft a media release and enter the recommendations into an Excel spreadsheet or against the relevant Issue of Interest in *Resolve* so you can contact the agency in the agreed timeframe (usually three to six months) to follow up on their implementation of the report.

Chapter 4—Complaints about us

The office welcomes positive and negative feedback. Members of the public have the right to complain about aspects of our general service delivery. Complaints give us the opportunity to improve the service we provide.

Under the Privacy Act individuals have the right to complain about the handling of their personal information.

A service delivery complaint is an oral or written expression of dissatisfaction with an aspect of the services provided by the office, other than the decisions made in relation to an approach. It is different to a request to escalate a call to a direct supervisor (see section 2.1 Escalating the approach)

This may include allegations of inappropriate conduct by staff, our responsiveness to an approach, rudeness by a particular officer, conflict of interest, undue delay, or even corruption. Service delivery complaints may also relate to access to phone services or services provided through our website.

Note: There is a difference between corruption allegations from members of the public and corruption allegations from former or current public officials. The latter may constitute a Public Interest Disclosure and need to be handled in accordance with the PID Act.

Complaints about the decisions we make in relation to approaches to the office, such as deciding not to investigate an approach or not to investigate further, are not service delivery complaints, but rather are managed through the internal review process (see section 4.3 Internal reviews).

Complainants also have external rights of review (see section 4.5 External reviews) in relation to the decisions we make. Phone calls in relation to internal or external review rights are not lodged as service delivery complaints.

Quick checklist: is it a service delivery complaint?

Yes, if the complainant is unhappy with our service, for example if they are complaining about:	No, if the complainant is unhappy with our decision, for example if the complainant is making:
• **our access points (phone, fax, email, or web)**	• a complaint about a decision, including a decision not to investigate or to cease investigating their complaint
• **conduct of staff members (for example, rudeness, error or lack of response)**	• a threat to a staff member
• **timeliness of our enquiries (for action outside of service standards)**	• an FOI request* • if the complaint relates to action which is still within our service standards
• **probity of staff members (for example, conflict of interest or corruption)****	• a request for information (for example, contact details for our office or another agency, or information about our jurisdiction)

*If an FOI request is received or you consider that the complainant may be seeking to make an FOI request then this should be referred to the Legal and Information Access Team as a matter of urgency as statutory timeframes apply in relation to FOI.

**As noted above, there is a difference between corruption allegations from members of the public and corruption allegations from former or current public officials. The latter may constitute a Public Interest Disclosure and need to be handled in accordance with the PID Act.

4.1 Handling service delivery complaints

Before proceeding, remember that a complaint about a decision, an information request, or an FOI request, is not a service delivery complaint.

The details of all service delivery complaints should be recorded in *Resolve* with 'Commonwealth Ombudsman' as the agency and 'Service delivery' as the subject.

The service delivery complaint should be directed to the direct supervisor of the person complained of in the first instance. Wherever possible, service delivery complaints should be dealt with in consultation with the PCO or IO who handled the matter. Resolving a service delivery complaint may simply involve giving more information, providing an explanation, suggesting a solution, providing an apology or expressing understanding and empathy in situations where there is no solution.

If the complaint cannot be resolved as above, the complaint should be assigned to your team manager, or if appropriate the relevant SAO, who will work with you on a response. The actions you and your manager take to resolve the complaint, and the outcomes, should be recorded in *Resolve*. Service delivery complaints are monitored. We should aim to resolve all service delivery complaints within two weeks.

Quick checklist: how should we respond to this service delivery complaint?

Type of service delivery complaint:	Response:
• **our access points (phone, fax, email, or web)**	• alert the Help Desk to a possible problem with our access points
• **conduct of our staff (for example, rudeness, error or lack of response)**	• ask the complainant to provide the reasoning/evidence for this view • immediately notify the relevant manager or Senior Assistant Ombudsman
• **timeliness of our enquiries (for action outside of service standards)**	• evaluate against our service standards
• **probity of our staff (for example, conflict of interest or corruption)***	• ask the complainant to provide the reasoning/evidence for this view • immediately notify the relevant manager or relevant SAO

**As noted above, there is a difference between corruption allegations from members of the public and corruption allegations from former or current public officials. The latter may constitute a Public Interest Disclosure and need to be handled in accordance with the PID Act.

4.2 Outcomes of service delivery complaints

Resolving a service delivery complaint may simply involve giving more information, providing an explanation, suggesting a solution, providing an apology, or expressing understanding and empathy in situations where there is no solution.

If a service delivery complaint concerns timeliness, policy or procedural issues, this should be evaluated against our service standards (see section 1.4 Service standards). If the

relevant service standards have been met, it is preferable for these matters to have been left as a message for the relevant action officer in the first instance, as opposed to a service delivery complaint. However, you should advise the complainant accordingly, while being mindful of the need to address their concerns (for example, our standards may not meet their expectations).

If the relevant service standards have not been met, discuss the possible reasons for this with the original officer, advise the complainant, and consider an appropriate remedy. In some circumstances, it may also be appropriate to refer policy and practice issues to your SAO to consider a re-evaluation of the relevant policy/practice.

Breaches of our service standards should be reported to the relevant manager. If there is concern about the original officer's personal conduct or probity in relation to the matter, you must immediately notify the relevant manager or SAO for necessary action.

If a service delivery complaint concerns allegations of rudeness, bias, corruption or incompetence, you should ask the complainant to provide the reasoning/evidence for this view. Often, such complaints actually represent a request for review of a negative decision, and should be handled accordingly.

4.3 Internal reviews

Where a complainant remains dissatisfied with an IO's decision to decline to investigate or to cease investigating their complaint, after the IO has reconsidered that decision, then the complainant may request the IO's decision be reviewed.

It is the responsibility of the IO to inform complainants they may request review of any decision, including a decision not to investigate their complaint. However IOs should explain to complainants that:

- simply being unhappy with a decision is not usually sufficient grounds for a review
- they must clearly identify why they consider the original decision was incorrect or unreasonable and provide supporting information or evidence.

In the case of category 1 and 2 approaches, the review evaluates the decision to decline to investigate the approach. For approaches in category 3 and above, the review considers the investigation undertaken and the outcome reached.

On occasion, a complainant will request a review while an investigation is underway because they are unhappy with a decision to investigate only some of the issues they raised. See 'Review during an investigation' below for more information.

Our internal review process is consistent with the principles of procedural fairness and acknowledges that it is possible for us to make mistakes or overlook important information in the course of an investigation. The internal review process also enables us to learn from our mistakes in order to continuously improve our work practices and service delivery across the Office.

Reviews are not conducted under the *Ombudsman Act 1976*; they are an administrative process that we offer to complainants at our discretion, and usually only occur once.

How do complainants request a review?

Requests for review must be received within three months of the date of the original decision, except in exceptional circumstances (for example, where a complainant has been

hospitalised or otherwise incapacitated for an extended period). The IO should suggest the complainant explain the delay when seeking a review outside the three month period.

Requests for review should be in writing, unless the complainant is unable to communicate in writing, in which case alternative arrangements should be made to assist the complainant to lodge their request (for example, taking the request verbally).

A form is available to help complainants clearly set out their reason(s) for requesting a review and to articulate why they are dissatisfied with the decision or investigation process/outcome. While it is not mandatory for a complainant to use the form, the complainant should include the type of information described in the form, to allow their request to be properly considered. This includes clear reasons for requesting the review and their reasons for objecting to the decision or investigation process/outcome.

Before actioning a review request, IOs should read through the review request and ensure there is nothing that warrants a different decision about the complaint. If the IO retains their original position, they can trigger the review process. The Resolve action that seeks approval for a review should include a brief explanation of the complaint, decision made, submissions from the complainant, reconsideration decision, and review request.

If the review request raises new issues that warrant the registration of a new complaint, the IO must register the new complaint in Resolve, including whether it should be reallocated to the IO and allocate it to either Early Resolution (if the case is for early resolution) or Investigations (if the case is for investigation).

What the review considers

A review is not a re-investigation of an approach. Rather, the purpose of a review is to assess:

- the **process** adopted by the investigating officer was adequate to address the key complaint issues raised by the complainant. This may include, for example, whether procedural fairness was applied, adequate information was gathered, and the issues were analysed in sufficient depth
- the **merit** of the officer's conclusions, such as whether the conclusions were reasonable and correct, and were properly explained.

How a review is conducted

All review requests are acknowledged by the Review Manager (RM) within 10 working days. The RM decides whether or not a review is to proceed and advises the complainant. The RM has discretion as to whether to grant a review but is likely to decline a review request where the request:

- does not make sense
- concerns an issue that is clearly outside our jurisdiction
- where a complaint was closed due to the complainant’s lack of cooperation or refusal to provide information in response to an IO’s reasonable request
- is better dealt with as a new complaint
- is better dealt with as a service delivery complaint
- concerns an issue that is clearly without any merit
- concerns an issue that has been considered by this Office previously
- does not articulate any reason for being dissatisfied with the decision or investigation process/outcome
- is seeking an outcome that cannot be achieved by the Office.

The RM may also remit a matter back to the original IO for further work if the RM considers that a review is premature. For example, where a reconsideration decision has not been made by the IO, the IO has not had telephone contact with the complainant (unless there is good reason not to) or there has been an obvious error or oversight.

Where a review is to be conducted, the complainant is advised who will be conducting the review (the Review Officer (RO)) and the possible outcomes of the review. The RO should not have had prior involvement with the matter.

The RO should inspect all electronic and hard copy documents on file. Where possible, the RO should contact the original IO as part of the review process, particularly if the complainant has made any adverse claims or assertions so the IO has an opportunity to comment. Likewise, the RO should also contact the complainant, by telephone in first instance followed by email, to explain their role and process, and to ensure the reasons for review are fully understood and all relevant material has been provided.

We aim to complete reviews in 90 days.

Review conclusions

A review can result in one of two decisions:

1. a decision that all or part of the complaint should be investigated
2. a decision that our Office should take no further action on the complaint either because of the original decision is correct or for another reason explained by the RO.

Making a decision and informing those involved

Further investigation required

If the RO forms a view that the matter warrants further investigation, the RO must send an email to the RM setting out:

- a brief history of the complaint and relevant decisions
- issues identified in the review and recommendation that the matter be re-opened
- the original IO's view point (if they disagree with the RO)
- advice as to whether the matter should be returned to the original IO or re-allocated
- areas warranting separate action such as an apology for poor service or training for an IO, and
- a list of suggested areas for focus and reasons for their recommendation.

This information and analysis should also be captured in an action in the review Resolve record. This can be utilised by the IO who is later allocated the complaint, if further investigation is required.

If the recommendation to re-open the complaint is supported, the RM will forward the email to the relevant Senior Assistant Ombudsman (SAO) for a final decision.

If the SAO supports the recommendation, the RO can then inform the complainant of the outcome of the review. This should occur as soon as possible and can be done in writing or on the phone. If the recommendation is not supported, internal consultation is required before the complainant can be informed of the outcome.

When communicating with complainants, ROs should avoid express or implied criticism of an agency if the agency has not already had an opportunity to respond to that criticism during an earlier investigation. ROs should also inform complainants of the proposed area of

focus if further investigation is warranted, but also explain that these suggestions are not binding and can change as further information comes to the attention of the IO. If any issues raised by the complainant are not included in the re-opened investigation, the RO must explain the reasons for this to the complainant.

Further investigation not required

If the RO decides they can reach a new conclusion without a further investigation, or decides to affirm the original IO's conclusion, they do not need to consult with the RM or SAO first. The complainant must be informed of the reason(s) for the decision. The complainant should also be informed that it is our policy to only review a matter once.

Further investigation

Where it has been decided that a matter warrants re-opening, either the Director of the team responsible for the original complaint or the RM will determine who will investigate a re-opened complaint. In most circumstances, further investigation by the original IO will be inappropriate.

When the RO closes the review, they will need to re-open the original complaint record. This is done by clicking on the 'reopen reviewed' button at the top of the original complaint's home screen. The RO should then allocate the complaint to the IO undertaking the further investigation. All activity concerning the further investigation is to be recorded in Resolve on the original, re-opened complaint record (not the review record).

The IO conducting the further investigation should generally contact the complainant within a week of allocation. Where possible, this should be done by phone. This IO must also offer the complainant an opportunity to respond to their subsequent decision to cease an investigation, and carry out a reconsideration in the same way as they would with an ordinary complaint. This is because procedural fairness obligations arise again at the conclusion of the new investigative process. The complainant should be informed of the review process again but it is unlikely a further review would be granted unless new material that has not been previously considered came to light.

If, on receiving the reallocated matter, the IO does not agree with the suggestions made by the RO, then the IO must contact the RO or RM to discuss the situation. This should be done quickly so the complainant is not left wondering about the progress of their matter. Any agreed change in position needs to be documented on the complaint record along with reasons.

Recordkeeping

All details relating to the review process must be recorded in the 'review' section of *Resolve*, which is separate from the original approach workflow.

If a formal hardcopy file has been created in relation to the approach that is subject to the review, papers relating to the review should be included on that file. There are no separate hardcopy 'review' files.

Reviews during an investigation

At the start of an investigation, the IO will inform the complainant which matters they will investigate. If the complainant disagrees with a decision to only investigate some issues, the IO must reconsider their decision in the ordinary way. However, as the complaint is also concurrently being investigated, many of the usual review steps in Resolve will not be

available. Accordingly, the reconsideration decision must be recorded in a 'Decision' action. If the IO maintains their decision, the complainant should be informed they can seek review of the decision to only investigate some aspects of their complaint. The complainant should be asked to put their reasons in an email (where possible). When those reasons are received, they will be considered by the IO to see if they wish to change their decision. If the decision remains unchanged, the IO creates a briefing action to their supervisor/director who will consider the review request.

Depending on the issues, the supervisor/director may also wish to consider whether it is better dealt with:

- as a service delivery complaint
- a new complaint
- by re-allocating the complaint.

If they remain dissatisfied, the complainant will retain the option of seeking a formal review in accordance with the usual review process after the closure of the complaint.

Contacts from the review applicant

Contacts when the RM is considering the request

If the complainant contacts this Office after making a review request but before the RM had decided whether to grant the review, the complainant should be advised that the RM aims to make a decision within 10 working days. If the complainant wishes to speak to the RM they should be encouraged to put their information in an email instead. If the complainant is incapable of communicating in writing, or is facing some other significant communication barrier, the RM can be contacted to see if they are willing to speak to the complainant.

If the call cannot be referred to the RM, a record of the contact must be made in Resolve in accordance with the usual practice for recording calls from complainants.

Written contacts are to be registered in Resolve and referred to the RM.

Contacts when a review has been granted

If the complainant contacts this Office when a RO is considering the matter, they should be referred to that RO. Written contacts are to be registered in the review file in Resolve and referred to the RO.

If the call cannot be referred to the RO, a record of the contact must be made in the relevant review file in Resolve in accordance with the usual practice for recording calls from complainants.

If after a review, the complaint is re-opened and allocated to an IO, any contacting complainant should be referred to that IO. If the call cannot be referred to the IO, a record of the contact must be made in the re-opened complaint record in Resolve in accordance with the usual practice for recording calls from complainants. Written contacts are to be registered in Resolve and referred to the IO.

Contacts after the review and subsequent investigation (if any) has ceased

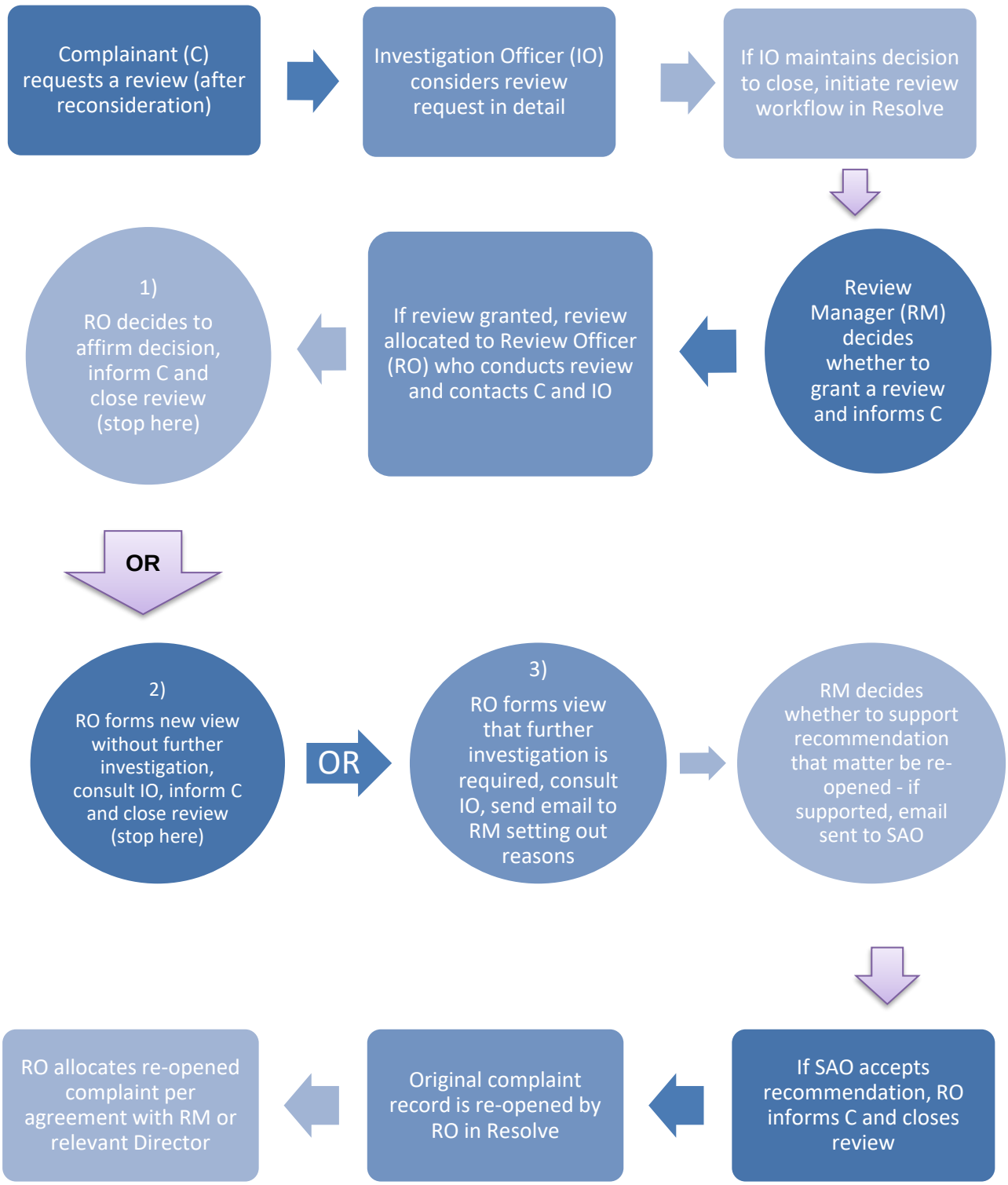
The RM may place an alert on the complainant's record noting the issue that we have finalised, reviewed and that further correspondence about the same matters will be read but not responded to.

Complainants may contact this Office after a review has been declined, a review has been finalised with no further action, or investigation following a review has been completed. If written contact is received, it should be referred to whomever made the last substantive decision. This will usually be the RO or IO or another officer who has been assigned with the responsibility for assessing the complainant's contacts. Failing this, refer the material to the RM.

The officer who is allocated this correspondence must consider whether it raises new material that could change their previous decision. If not, the officer must document this assessment and note that no further action will be taken in response to that correspondence. If the correspondence does provide new and persuasive information pertaining to previous complaints/reviews, the officer must engage with the RM to decide how to respond to that material. This may lead to a new complaint or the re-opening of a previous complaint.

If the correspondence raises new issues that have not been previously considered by this Office, the officer must register a new complaint in Resolve and allocate it to the relevant team for action.

Review flow chart


Complainant (C) requests a review (after reconsideration)
Investigation Officer (IO) considers review request in detail
If IO maintains decision to close, initiate review workflow in Resolve
Review Manager (RM) decides whether to grant a review and informs C
If review granted, review allocated to Review Officer (RO) who conducts review and contacts C and IO
1) RO decides to affirm decision, inform C and close review (stop here)
OR
2) RO forms new view without further investigation, consult IO, inform C and close review (stop here)
OR
3) RO forms view that further investigation is required, consult IO, send email to RM setting out reasons
RM decides whether to support recommendation that matter be re-opened - if supported, email sent to SAO
If SAO accepts recommendation, RO informs C and closes review
Original complaint record is re-opened by RO in Resolve
RO allocates re-opened complaint per agreement with RM or relevant Director

4.4 Handling Privacy complaints

APP 1 requires agencies to have a clearly expressed and up to date policy about the management of personal information by the agency. The Ombudsman's APP privacy policy is available on our website. The APP policy sets out the matters that are required by APP 1, including how an individual may seek access to their personal information and seek correction of this information as well as how to complain about a breach of the APPs. A complaint about a breach of privacy by this office must be referred to the Legal Team.

4.5 External reviews

Complainants have the right to:

- request, under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), a statement of reasons for a decision we have made about a complaint
- apply to the Federal Court or Federal Circuit Court for a review of a decision we have made about a complaint. Complainants should be made aware that legal proceedings of this type are limited to narrow questions of lawfulness and can be slow, complex and expensive (with costs usually awarded against an unsuccessful party), and that they may not lead to any significant change. For example, if the office were found to have made a legal error in deciding to cease an investigation, the court might set aside that decision, enabling the office to make the same decision again but without legal error.
- request that the Office of the Australian Information Commissioner review a decision by our office about a Freedom of Information request for documents in our possession.
- write to Federal Members of Parliament (including Ministers or the Prime Minister) to raise concerns about Ombudsman actions. However, it should be noted that MPs are not able to review, direct or override our work under the Ombudsman Act. Therefore it may be more effective for the complainant to raise concerns with the Minister responsible for the agency.

Responding to requests for formal statement of reasons

Complainants can seek a formal statement of reasons from our office under s 13 of the ADJR Act. The requirement for reasons does not apply where reasons for the decision were given in the notification of the decision. You need to respond to such requests within 28 days and include:

- your findings on material questions of fact
- the evidence on which those findings are based
- the reasons for the decision.

The officer who made the decision should prepare the 'Section 13 statement' and must clear it through their manager and the Legal Team before providing it to the complainant.

The Administrative Review Council's website provides *Practical Guidelines for preparing statements of reasons*, which IOs may find helpful.

Review by the Federal Court or Federal Circuit Court

Section 5 of the ADJR Act enables a person who is aggrieved by a decision to apply to the Federal Court or the Federal Circuit Court for a review. These Courts can only examine questions relating to the legality or process of decision-making and cannot examine the merits of our decisions. The grounds for review are:

a. that a breach of the rules of natural justice occurred in connection with the making of the decision
b. that procedures that were required by law to be observed in connection with the making of the decision were not observed
c. that the person who purported to make the decision did not have jurisdiction to make the decision
d. that the decision was not authorised by the enactment in pursuance of which it was purported to be made
e. that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made
f. that the decision involved an error of law, whether or not the error appears on the record of the decision
g. that the decision was induced or affected by fraud
h. that there was no evidence or other material to justify the making of the decision,
i. that the decision was otherwise contrary to law.

Chapter 5—Reference material

5.1 Definitions

Approaches

An approach is a contact with the office about a new matter regarding one of our core business functions.

Approaches about the Ombudsman's office

Media—enquiry from TV/newspaper/radio (e.g. a journalist rings to seek an interview with the Ombudsman; a newspaper seeks comment regarding a recently released public report into detention issues). Note: media to be handled by Corporate Strategy and Communications Team only.

Outreach—enquiry about office outreach activities (for example, enquiry from Townsville following talk given at local CWA).

Publications—request for office publication (for example, copy of Annual Report).

Research—student/academic request for information to support research project (for example, statistics to support PhD thesis; information for project or essay).

Survey —enquiry about office survey activity (for example, clarifying a question; checking validity of survey).

Website—feedback or query re office website (for example, 'a link is not working' or 'where can I get a copy of …?').

State/non-government approaches

Banking—approach about banks, credit unions and building societies, and information requests for Financial Ombudsman Service (for example, 'How do I complain about my bank's charging system?').

Commercial—approach about private or commercial companies, and information requests for industry regulatory authorities (e.g. Consumer Affairs).

Employment (non-APS)—approach about non-APS employment related matter or request for contact details for bodies that can assist (for example, 'How do I complain about a selection process?')

Health—approach about health industry matter or request for information regarding regulatory bodies (e.g. 'How do I complain about my treatment at X Hospital?')

Insurance—approach about insurance products (including health insurance), requests for contact details for regulatory bodies (e.g. 'I want to complain about an accident claim I'; 'what's the number for the Private Health Insurance Industry Ombudsman?').

Legal—approach against non-government lawyers, judges, court decisions, (e.g. I'm concerned my solicitor overcharged me) and requests for contact details for regulatory bodies (e.g. Law Reform Association, Law Society, Legal Ombudsman).

State—approach about state (excluding ACT Government) or local government matter (for example, I want to complain about the road works in my street), and request for information (e.g. 'What's the number of the Northern Territory Ombudsman?').

Superannuation—complaint about superannuation products and providers (e.g. 'My fund has not supplied me with a statement for 2 years'), and requests for contact details of the Superannuation Complaints Tribunal, etc. Note: ComSuper is generally within our jurisdiction.

Telecommunications—approach about telecommunications carriers and internet service providers (e.g. 'I want to complain about my mobile package') and requests for contact

details for the Telecommunications Industry Ombudsman (TIO), Australian Communications and Media Authority (ACMA) etc.

Other OOJ approach—other OOJ approach or information request not fitting into above categories.

Out of jurisdiction (OOJ) Commonwealth

Decision/action of judiciary—decision complained of made by judge or magistrate (for example, court order re custody of children in CSA matter).

Decision/action of Minister—decision complained of made by an Australian Government Minister (e.g. decision by Minister of Immigration – using discretionary powers under the Act not to grant a visa in a DIBP matter). Note: We are not authorised to investigate actions taken by Ministers. We can, however, investigate decisions made by public servants using Ministerial delegations; actions taken by departments in relation to Ministerial decisions; and Department or agency advice to Ministers (e.g. briefing material). Note: You should bring these matters to the attention of the relevant SAO before deciding whether or not to investigate the approach.

APS employment—decision complained of is related to employment in APS agency (for example, I lost my job unfairly). Note: we are able to consider employment matters within the Defence Force Ombudsman jurisdiction. Note: Some post APS employment issues may be in jurisdiction – consult the Legal Team.

Enquiry about agency process/practice/ procedure—to be used only when the person approaching us is merely seeking an explanation of an agency's practice or procedure (e.g. 'How does the child support assessment process work?' or 'How long does it take for a tax ruling to be issued?').

Enquiry about FOI process—query re Freedom of Information process only (e.g. 'How do I make an FOI request with an Australian Government agency?').

Political and Government issue—high-level established Australian Government policy issue (e.g. mandatory detention; collection of child support payments). General comment/approach re proposed political decisions/policies (e.g. 'The government shouldn't sell off Telstra'). You can suggest writing to relevant Minister or local Member.

Australian Government contact information—request for agency address, fax/phone number, etc. (e.g. 'Where is my local Centrelink office? Or 'What is the telephone number for the ATO?).

Other OOJ issue/ approach—issues not fitting into the above categories.

Investigation declined

Frivolous, vexatious, not in good faith—approach lacking substance, potentially motivated by desire to cause trouble for an individual or agency (e.g. 'I don't like the choice of font used in Centrelink letters', or where there is documented evidence to suggest the complainant is knowingly and deliberately withholding evidence). Can include repeat complainants. Note: This outcome should not be recorded lightly and only EL2 officers and above have the relevant delegation. You should consult your manager before selecting.

Insufficient interest—complainant lacks sufficient connection to decision/action complained of, and is not authorised to act on behalf of individual affected (e.g. 'My neighbour is being victimised by CSA but he doesn't know I'm calling').

Over 12 months old—complainant became aware of the decision/action more than 12 months ago but has taken no action until now, with no good reason (e.g. serious illness; decision letter not received). Particularly applies if the age of the matter would suggest that any evidence is ‘stale' or no longer in existence.

Government commercial activity—action/decision relating to the commercial activity of a department or prescribed authority but not including: contracting out, tender processes, (e.g.

cost of photocopying at the National Library; a commercial valuation by the Australian Valuation Office)

Application already made to court or tribunal—decision/action or related matter has been or is the subject of an application to a court or tribunal by the complainant. If this is the case, we are prohibited from investigating unless there are special reasons justifying an investigation. Applies even if application was made, but settled or withdrawn, but does not apply where agency or another person made the application.

Capable of being considered by court or tribunal —it would be or would have been reasonable for the complainant to apply to a court or tribunal for review of a decision/action. This is a discretion and does not have to be exercised. It can be relevant, for example, that a tribunal process may not be able to address a problem in a useful way or that it would not be reasonable to expect the complainant to take on the expense and burden of an application in the circumstances.

Considered by Minister—we are not authorised to investigate actions taken by Ministers. We can, however, investigate decisions made by public servants using Ministerial delegations; actions taken by departments in relation to Ministerial decisions; and advice to Ministers, (e.g. briefing material). Note: You should bring these matters to the attention of the relevant Senior Assistant Ombudsman before deciding whether or not to investigate the approach.

Not warranted in all circumstances—investigation not warranted but none of the above discretions apply (e.g. where there is no prospect of a useful remedy.) Also appropriate when more than one of the above applies.

Approach withdrawn—complainant requests investigation cease in writing or by phone.

Approach lapsed—complainant fails to respond to requests for information, or reasonable attempts at follow-up contact have been unsuccessful.

Request in writing not received—complainant fails to respond to request for approach in writing within 28 days.

Advised to pursue elsewhere

- Agency complained of—referred back to internal agency complaint path at first or second level – depending on action to date (e.g. to Job Services Australia provider in first instance and Department of Employment hotline if this course of action has been unsuccessful)
- Court—to seek legal advice if matter would more appropriately be handled by courts (e.g. seeking compensation for personal injury; dispute re assessment)
- Tribunal—refer to relevant tribunal if appropriate (e.g. if have not yet exhausted that review path and still within time limit or there may be scope to apply for extension of time limit).
- Other oversight body—refer to relevant oversight body (e.g. Privacy Commissioner, Australian Human Rights Commission
- Advice body—refer to industry advice body (e.g. Consumer Affairs, Community Legal Centre)
- Member of Parliament—suggest writing to local MP (e.g. on policy issues).
- Minister—suggest writing to relevant.

Remedies

Payment granted—decision made to grant payment (e.g. tax refund provided).

Payment restored—decision made to restore benefit (e.g. pension).

Payment increased—decision made to increase amount of payment (e.g. a higher rate of Austudy)

Penalty waived or reduced—penalty amount reduced or waived altogether (e.g. late fees; interest)

Debt waived or reduced—debt amount waived or reduced outside of the scheme for Compensation for Detriment caused by Defective Administration (the CDDA scheme) scheme (e.g. overpayment debt recalculated and reduced by agency).

Fee refunded/waived/reduced—(e.g. visa application fee).

CDDA scheme payment—payment made under the CDDA scheme for Compensation for Detriment caused by Defective Administration

Act of Grace payment—payment made under Act of Grace provisions (e.g. DVA benefit back paid in lump sum to Vietnam veteran)

Other financial remedy—financial remedy not fitting into above categories (e.g. transferred to different benefit, test case funding provided)

Action expedited—agency pushed through decision or action in response to Ombudsman involvement

Agency apology—agency acknowledgement of error and expression of regret (e.g. letter issued to complainant; or to Ombudsman on behalf of the complainant)

Agency undertook to reconsider matter—after Ombudsman involvement, agency agreed to reconsider decision/action (e.g. to conduct fresh review)

Decision changed—after Ombudsman involvement, agency agreed to alter the decision or take different action (e.g. withdraw from prosecution action)

Better explanation – by agency—after Ombudsman involvement, agency provided clearer explanation for decision or process

Better explanation – by Ombudsman—Ombudsman was able to provide clearer explanation for original agency decision/action

Change to policy/ practice/law—after Ombudsman involvement, agency identified a change to its policy or practices or developed legislative amendments (e.g. establishment of a QA process before finalising correspondence)

Other non-financial remedy—other remedy not fitting into above categories (e.g. systemic issue to be addressed)

Agency officer counselled or disciplined—agency staff member responsible for decision/action counselled or disciplined by agency

General causes of complaint

Deficient advice

- Difficulty accessing—lack of access to advice (e.g. no information brochures available at counter or difficulty getting through on telephone)
- Unclear—advice given not easily understood or ambiguous (e.g. contains excessive jargon and legislative references, without making reasons for decision reasonably clear).
- Incomplete—advice given not complete (e.g. advised applicant eligible to apply for visa but neglects to make it clear which visa)
- Delay—agency is taking too long to provide advice (e.g. agency failed to acknowledge complaint within advertised timeframe)
- Fail to provide—agency has responded but has not addressed the issue (e.g. agency only answers two out of five questions)
- Inconsistency/conflict—advice given by agency not consistent with previous/other advice (e.g. counter staff advise eligible for visa but Internet information suggests applicant over age limit)
- Irrelevant—advice given not relevant to issue (e.g. advice provided refers to incorrect benefit)

- Wrong—incorrect advice given by agency (e.g. advising person not eligible for a benefit when it is subsequently determined they are)

Improper conduct (conduct contrary to APS Code of Conduct)

- Rudeness—lack of respect and courtesy (e.g. deliberately unhelpful, abusive)
- Bias—agency staff member(s) displayed discriminatory view of person or issue, which impacted or is perceived to have impacted on decision process Conflict of interest—staff member of agency has failed to disclose a conflict of interest in connection with their duties; or there is a perceived conflict of interest (e.g. decision maker is applicant's best friend)
- Breach confidence—staff member of agency has revealed/misused information supplied (e.g. commercial in confidence information submitted with tender application)
- Improper use of Australian Government resources—using agency resources for personal gain (e.g. stealing office supplies from agency and selling them at local markets; using corporate credit card for unapproved purchases) Note: substantive matters of this nature should be referred to your manager.
- Improper use of information/ position—agency staff member using inside information to seek to gain or benefit or advantage for themselves or another person (for example, accessing agency records to locate former spouse); or using duties, status, power or authority to seek to gain benefit or advantage (for example, using agency letterhead and title when writing to appeal against parking fine).
- Harassment—offensive, belittling or threatening behaviour directed at an individual or group, often focused on their gender, cultural or racial background or disability. Note: may be better handled by Australian Human Rights Commission.

Deficient decision

- Application of law/rule—decision the result of legislation or regulation applied inappropriately/unfairly (e.g. applicant considered against wrong legislative criteria)
- Calculation—decision the result of incorrect calculation (e.g. benefit reduced based on basis of incorrect income assessment)
- Date of effect—date the decision comes into effect is unreasonable
- Delay—agency is taking too long to make decision (e.g. agency has not made review decision within advertised timeframe)
- Failure to act—agency has responded but not made the decision it said it was going to (e.g. make review decision)
- Wrong—decision incorrect (e.g. applicant disagrees with decision not to grant visa)
- Deficient action (leading to or resulting from a decision)
- Application of law/rule—action the result of legislation or regulation applied inappropriately/unfairly
- Calculation—action the result of incorrect calculation (e.g. collection action commenced based on incorrect income assessment)
- Date of effect—date of the action is incorrect or unreasonable (e.g. imposing fines on operators the day the legislation becomes effective, yet there are no guidelines available)
- Delay—agency is taking too long to take action
- Failure to act—agency has responded but not taken the action it said it was going to
- Wrong—action incorrect or inappropriate (e.g. commencing collection action prior to review outcome)

Other

- Unfair policy—relevant policy is flawed, limited, unclear, or does not adequately cover circumstances (e.g. uncertainty about which agency/jurisdiction is responsible for a matter; where a certain class of people are excluded from a settlement)
- Unfair legislation—relevant legislation is flawed, limited, unclear, or does not adequately cover circumstances
- Not determined—unable to determine cause of complaint. Must provide details.

Sensitivity

Correction/detention facility—assigning this sensitivity to an approach in *Resolve* indicates the person making the approach is located in a correction facility. See: Letters to detainees for information about corresponding with complainants located in a correction/detention facility.

Media—indicates there is real or perceived media interest in the approach or issues contained in the approach. For example, a journalist contacts the office with a media enquiry or a complainant claims to have contacted the media regarding their complaint or states they intend to contact the media. Also applies to approaches containing issues of current interest to the media.

Member of Parliament—indicates an approach made by a Member of Parliament or their staff, on behalf of a constituent. See: MP complaints for more information

Ministerial—indicates the approach relates to a matter which is/has been the subject of Ministerial involvement. For example, an Act of Grace payment decision involving the relevant Minister.

Public Interest Disclosure—indicates the person making the approach (either an ACT public servant or a member of the public) is reporting alleged wrong doing in the ACT government under the Public Interest Disclosure Act 1994. See: Role of the ACT Ombudsman - Public Interest Disclosure and Whistle-blower complaints for more information.

Not sensitive—indicates the approach is not sensitive.